

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-2030
77-2031

To be argued by
CARL T. SOLBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-2030, 2031

LYMAN T. SHEPARD,
Petitioner-Appellant,
—v.—

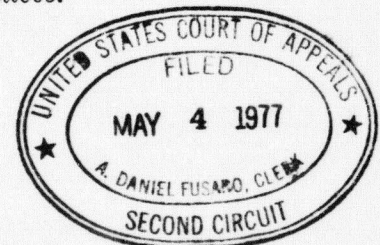
LARRY TAYLOR, Warden, Metropolitan Correctional
Center, and MAURICE SIGLER, Chairman, United
States Parole Commission,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLEES' BRIEF

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Hearing Examiner - - Ouirk ("O")
Van Waldraven ("VW")

Lyman Shepard -- ("LS")

Gordon Johnson -- (GJ")

Q All right, sir. You are Lyman Shepard?

LS Yes.

O All right Mr. Shepard. My name is Ouirk. This is Ms. Van Waldraven. We are examiners with the Parole Commission and our purpose here today in your situation, Mr. Shepard is to inquire into the alleged violation of your parole. You were notified that the case would be heard at this time. I know that you have petitioned the Court for representation. I believe that Mr. Johnson now is here in response to that petition. Is that right?

LS Yes.

Q Mr. Johnson, for the record will you give us your full name and your affiliation with [] and your address with zip code, and your telephone number with area code.

GJ Gordon J. Johnson, Gordon J. Johnson, The Legal Aid Society, Parole Revocation Defense Unit The Legal Aid Society, Federal Defenders Unit, 15 Park Row, New York, New York 10038. My telephone number is area code 212-577-3500. ,

Q All right, sir, thank you. Mr. Shepard, in accordance with our procedures I want you to go over what we call a check-list of procedures and legal rights to make sure that we are in proper season at this point. I would ask you to be certain of little items after you have responded. Either yes or no. You have received notice of the hearing []

LS Yes.

Q You have been advised of your right to counsel.

LS Yes.

Q And you have voluntary witnesses.

LS Yes.

Q I see. You have, I believe, completed the form I-16 in which

you asked for appointment of counsel and Mr. Johnson, as I say, has been appointed by the Court for that purpose. Is that correct, sir?

LS Well, I've completed the form, yes, sir.

Q Have you been advised of the charges, in other words, have you received a copy of what we call a Form H-20, the Warrant Application [].

LS Yes.

Q Are you now familiar with those charges.

LS Yes.

Q Do you believe that you've had sufficient time to prepare your case and confer with your attorney on the charges.

[Pause] [Telephone ring]

Q The question was have you, do you believe you had sufficient time to prepare your case?

LS I had wanted to subpoena witnesses and have not been able to do that. However, I feel that I might suffer irreparable damage to my cause if we don't proceed with the hearing.

Q Well, sir, let me put it this way. At this point, are you, have you decided, are you agreeable to proceed at this point?

LS Yes, sir.

Q All right. You do have a right to give your explanation of the charges and this is what we've looking for. . . and we'll get into the charges. And I would explain just a little bit further how we do that as far as procedure is concerned. We say that Mr. Johnson is here to represent you, and we will direct our questions to you. We would ask that you [] at any time. Feel free to confer with your attorney or ask him any questions or any other advice that you need. The hearing that we conduct, we try to keep as informal as possible. We are not a court of law, and we are not here to litigate issues of law in that sense. We are just here for the purpose to decide whether there has been a violation of your parole. If there. . . in the event that we do find that you violated parole, of course, this is a decision to be made. It is a tentative decision. There would be then a follow-up decision as to what to do with the crime that you were in violation of. Whatever decisions you are tentative. They don't become final until you put them in writing. That comes within twenty-one days from the Regional Office. You do have a right to appeal those decisions. At the time you get the decisions back you will have the necessary information as to how to appeal. If you need any further information you can talk to the staff here on the technicalities or paper work and things of that nature, all right?

LS Yes.

Q All right, Mr. Shepard, just to bring us up a little bit to date correct me if I'm wrong because I've been working from a file that is rather old. You were recently sentenced to YCA 5010(b) term in July of 1972, right?

LS Yes.

Q In Texas.

LS Yes.

Q I believe you were originally confined to El Reno.

LS Yes.

Q You were, however, when you were released on parole, released in Tallahassee, so you must have transferred there in the meantime.

LS Yes, sir. That's the [1.

Q I see. The record would indicate that initially at your initial parole hearing, you were set off for approximately eight months and that at that time in July, 1972, you did receive a parole grant for a halfway house.

LS Yes, sir.

Q This did not work out, so that was rescinded and you continued for a hearing on the next docket in November, but in December you got the parole that was effective on April the 18th.

LS Yes.

Q 1974, to an approved plan, this time, which was the Middle District of Florida.

LS Yes.

Q The record indicates that the allegation is that you violated parole on or about the 18th of October, 1974. Now a warrant was issued on January 9, 1975, and again the record will indicate that this was placed as a detainer because you had been sentenced to a term in the state. Is that sequence right?

LS Yes, it is.

Q And following that chronologically then you were paroled from the state sentence on the 15th of December, 1976. Taken into custody by the United States Marshal. Held in the Schenectady County Jail. And brought back here on or about the 30th of December. At that time you would have had some 1469 days remaining to be served in your full term date. You know, time is still running on the [] is set at April 9, 1978.

- LS: Well, that's [] I don't believe that I have 1400 days?
- Q. Well, at the time you wouldn't have. At the time you came out...
- LS: No, sir. I think the time I came to the state I would only have approximately 16 months.
- Q. No, I was talking about the time you were released on federal parole; but that's really academic because your time has been running anyhow. So for custody purposes, you've been in federal custody on this warrant for about a month. From the 15th to about the 11th.
- LS: Yes.
- Q: All right, sir. Now what I'd like to do is go through the charges, there are two...
- GJ: Mr. Quirk, if I may interrupt for just a moment, there were some complications that we had prior to the beginning of this hearing that I think should be reflected in the record.
- Q: Go ahead, Mr. Johnson.
- GJ: One, we had brought a court reporter from the Southern District of New York and asked that he be permitted to make a stenographic recording of this proceeding. In our conversation prior to the beginning of this hearing, I was informed that that would not be allowed in accordance with manual rules, I believe.
- Q: Procedural rules.
- GJ: Procedural rules of the commissioner. I would again formally make that request. Mr. Shepard has pending in the Southern District of New York a writ of habeas corpus that ... dealing with the issue of whether or not he has been denied rights with regard to subpoenaing of certain witnesses at this hearing and the transcript of this hearing as a result, is relevant to that proceeding. The provision of the transcript from the tape has been my experience and my office's experience, taken a long period of time. And as Judge Frankel pointed out in his recent opinion, it is very often indecipherable and unintelligible, and for that reason I would renew my request to have the court reporter allowed in here today.

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- Q: Mr. Johnson, we have indicated we have decided in consultation, even after our conversation before the noon not to permit that under our rules but your objection has been noted here, I will call for this to be the only official recording of the hearing and of course as you know you are entitled to apply to the Region for a copy of the transcript at any time.
- VW: That's a recording of the transcript.
- Q: Well, the recording of the hearing.
- GJ: The second thing was that Mr. Shepard has been working not only with me [] but Phylis Bamberger of the Federal Defenders Unit of the Legal Aid Society, and in fact Ms. Bamberger has represented Mr. Shepard in court proceedings regarding revocation of parole. We have worked together in this matter and I requested that Mrs. Bamberger be allowed to assist me hearing proceeding although she will not participate in the proceeding. I asked that she be allowed to be present during the proceeding so that I might, if necessary, consult with her.
- Q: And again, Mr. Johnson, as we had discussed, our procedures really do not either permit or deny that sort of a thing. It is our judgment however, that the limitations faced and the fact that you yourself are well aware of the case and that we would prefer to keep it as simple as possible and keep the room clear as possible. Now let me ask you in this connection, do you Mr. Shepard... the point that Mr. Johnson has raised is really not in the alternate, but would you rather have one or the other defend you at this point, at which time this could be considered, or whether Mr. Johnson who is here now is agreeable to...
- LS: Given only one, Mr. Johnson is agreeable.
- Q: All right, thank you. Your request is noted, and the answer to it also noted, Mr. Johnson. Do you have any other points at this time that you want to put on the record?
- GJ: I think the third point which we would like to place on the record is that we made request to the Regional Commissioner for subpoenas to be issued to require the appearance of S.W. Haley, Mr. Shepard's educational and prison counselor from Clinton Correctional facility at Dannemora, New York, and also requesting the productions for hearings and arguments of Mr. Shepard's prison record from Clinton. I would note as the record already has made clear, Mr. Shepard has been incarcerated for the past two years at Clinton Correctional Facility Annex in Dannemora, New York.

While there, he has undergone significant and I think relevant rehabilitation participation in college and rehabilitation programs. Mr. Haley was his counselor and has a personal knowledge of Mr. Shepard's progress, and changes and rehabilitation while in that institution. And it is my belief that the consultation with Mr. Haley and Mr. Shepard presence at this hearing is proper and essential to a fair disposition of the proceeding here today. I would also note that I believe it's a matter of constitutional right in the cases Morrissey v. Brewer and Moody v. Daggett, the presence of those records and of Mr. Haley is constitutionally required, although we have been denied that, and...

Q: It's denied by the Regional Commissioner, Mr. Johnson.

GJ: Yes.

Q: Again, sir, would you feel that Mr. Haley's presence at some time with or without the subpoena, if you will, and these records, are so germane that you are considering, or would consider, asking for a postponement in this case until you could produce Mr. Haley or other witnesses or something else that we could discuss?

GJ: Well, the position that we're in is that Mr. Shepard was paroled because on one of the factors in his early parole from New York state was his participation in his New York state parole program, which involves attending Clinton Community College in Plattsburg, New York, and the guarantee of part-time employment in Plattsburg to support him while he is attending college. Any delay in this hearing would seriously prejudice his ability to participate in those programs. And for that reason, we feel compelled to proceed, because of the harm that may befall Mr. Shepard if this proceeding is adjourned.

Q: Now, is that also your feeling, Mr. Shepard, that again going back to the question, that you want to proceed at this point with whatever information that we have or that you have and whatever is on the record?

LS: Yes, sir, I do, because it seems that the reason [] was denied or refused to issue me a subpoena, and I don't see where a postponement would necessarily insure that they would do so in the future, and my postponement could hurt me if I were to get a favorable decision.

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Q: Fine, Mr. Shepard, then if it is agreeable, we will proceed now. I am looking at the warrant application. What I am supposed to do, again according to our procedures, I am going to read these charges just as they appear on the warrant application. I'll read them to you singly. I'll ask you after each one if you admit or deny, and we'll go back and we'll tell you what information we have, and we want what information you have and we'll see...where and we'll go from there as far as establishing violation or not. It does indicate, and it's from the warrant application, and I note that you while you have had...seen a copy, I do not see that you have one before you now, perhaps Ms. VanWaldraven
....

LS: I'm familiar with it...but I didn't bring my copy.

Q: Oh, is that right?

VW: Did you want my copy?

Q: I would read this to you, and again the statement from the warrant application dated January 9, 1975, the charges are two, number one was leaving the district without permission. The indication is that on or about October 18, 1974, you absconded from supervision in the middle district of Florida. According to the information that Mr. Falkenberg sent to Mr. Connolly here in New York dated September 2, 1974 the allegation would be Mr. Shepard that you left the district without permission. Do you admit or deny that?

LS: Yes, that is true.

Q: I see...Number two is attempted robbery in the second degree. It states that on December 19, 1974, you were sentenced to four years in custody in New York Department of Correctional Services upon your pleading guilty to the charges of attempted robbery in the second degree. They go further to say that on October 18, 1974 you attempted to rob a Burger King restaurant in Manhattan, New York and on October 21, 1974 in the Superior Court for New York county pled guilty to this offense. And this information being sent to the commission by Mr. Falkenberg in his letter dated December 27, 1974. Again, the question is whether you admit or deny the act of attempted robbery in the second degree.

LS: No, I do not deny that. That is true.

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C: All right, an admission to that.....All right. Now you'll note that number one, leaving the district without permission referred to Mr. Falkenberg's letter. Mr. Falkenberg, in the letter that we have, written to Mr. Connelly stated that your mother told Mr. Falkenberg that you were being held in the House of Detention in New York City on a charge of armed robbery. That you had been before a state court on November 27, 1974, entered a plea of guilty with sentencing being set for December 17, 1974. You allegedly robbed a Burger King restaurant and subsequently were arrested by the New York City Police Department. And among other things, in the last paragraph that Lyman Shepard absconded from the middle district of Florida, since he did not have permission to travel outside the middle district of Florida. Which was an indication, as it looks on the face of it, that Mr. Falkenberg was not aware of the fact that you had left the middle district of Florida, until your mother advised him that you were in New York. Now this is what we have on that ... would you like to tell us on that, Mr. Shepard?

GJ: If I may interrupt at this moment, I would request to see the letter from Mr. Falkenberg, please.

Q: Yes. We'd be very happy.

GJ: Thank you.

Q: I think what the letter was indicating, he is saying on or about October 18, 1974 you left, presumably because it was on October 18, 1974 that you were arrested in New York. So I guess...

LS: I left earlier than that.

Q: Well, we'd like to know a little bit about that Mr. Shepard. If you could tell us when you left and why you left and where you were from whence you left.

LS: I don't know. I left fairly involved trying to explain why I left. I can't say that it will be excusable. But...

Q: Were you living with your mother?

LS: No, I was living by myself.

Q: Where exactly were you living?

LS: I was living on St. Pete Beach, in a house that I renting.

Q: St. Petersburg.

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LS:

Yes. I'd moved from Tampa because a regrettable incident had occurred in which my house was destroyed by somebody that went temporarily berserk or something, and subsequently was arrested and jailed for it. But made my living place uninhabitable. And I went... I managed at this time which was something that was very difficult, I managed to find this house in St. Petersburg. I more or less wanted to move away from the area I was in Tampa anyway because of the high, the presence of drugs and people using drugs especially young people and stuff like that, who decided that just plain using drugs were irrational in other ways, irresponsible in other ways. So I managed to rent the house on St. Pete Beach which was outside of Tampa before I moved into this house and before I paid rent on it I went to my parole officer in Tampa explaining the circumstances that my house was destroyed. I came in from work one night and it was just wrecked, it couldn't even be slept in that night.

Q:

Was that Mr. Falkenburg?

LS:

That was not Mr. Falkenberg, I can not remember the name of my parole officer in Tampa, my original parole officer. He informed me that in order for me to move to St. Pete that I would have to change parole officers. Which was something I didn't want to do. Since I got along well with my parole officer there...But I had to move and I had found a good place to move, with fairly low rent at the time it was hard to find any place to move because it was in the middle of the worst part of what they call the recession...This place I could rent for \$125 a month.

Q:

Is St. Pete outside the district of Tampa, Mr. Shepard.

LS:

No, it's in the same district, it's in the middle district but it's a different city.

Q:

Different, it's a different office covered?

LS:

It's a different office covered.

Q:

Who was your parole officer there. What was his name?

LS:

In Tampa or St. Pete?

Q:

Well, the one that you talked about that said that you'd have to transfer.

LS:

He told me I'd have to transfer. I don't remember his name. He told me I'd have to transfer parole officers. And he said that he'd have to get this move approved through my new parole officer as well.

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- Q: When did this actually happen, when your house was destroyed and...and you contracted for the other house?
- LS: This I believed happened probably in July.
- Q: Some about three months after...
- LS: Maybe July or August [] 3 or 4 months.
- Q: Did your parole officer in Tampa give you any idea that he would not approve it other than just that he would have to see it is could be transferred by being contacted.
- LS: Yes, sir, he said what was necessary was approval not only from him, he said it was alright with him, but he would need approval for the location from my new office which would be assigned to me and I waited for this and received notification from him that the new address was approved by my new parole officer. I never saw him, my new parole officer at this point. I moved out there. The first time I saw my new parole officer was, who was Mr. Falkenberg...was when he was out to my house one day where I was living. This time he seemed very upset on first coming out there for some reason. I could not understand why. It was the first time he'd met me.
- Q: Was it...you got word that your transfer had been approved?
- LS: Yes.
- Q: And the first time you saw Mr. Falkenberg was when he came out to the house which you had moved to on the basis of the approval.
- LS: He was very upset.
- Q: Did he say why?
- LS: I couldn't understand. At first, eventually he said he was upset with where I was living. He told me that St. Pete Beach, there was a street just up a few blocks from where I was that was considered a very hot drug spot. I told him that I had just moved out of what through my observation was an area which I wanted to move away from because of the presence of drugs and people taking drugs and the type of precariousness that brought to my situation or might tend to bring to my situation. I said although that area you speak of might have been listed as a "hot spot", my observations to date have shown me that it must've cooled off some, and I'm not inclined to be involved in that anyway. If it was not you know...

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Q: Did he indicate well all right you can stay where you're working or something?

LS: No. I was working. I had had jobs with the cab company in Tampa. I had no transportation at the time, and I attempted to get a job with the cab company down in the Beach. The cab company was willing to hire me. When it came to getting the paper it turned out that the city council had a law on the books that prevented me from driving a cab as an ex-convict. The owner of the cab company which I went, the Diamond Cab Company, said that we could go to the city council and have the law changed. But meanwhile, I couldn't drive a cab, but he still had work for me. He had yard work and stuff like this that I could do in the meanwhile. My main objective was to get in school, to get in college, which eventually failed because there were several obstacles in my situation. I had some work, I did not have full employment right at that time. I was involved with the city council. They had agreed to change the ordinance. As soon as they went through the technicality of changing the ordinance, I could get a license to drive a cab and I would have a full-time job right there near my residence, and hopefully at that time I still hoped to get registered in college.

Q: When then did you actually leave that district, Mr. Shepard. Was it shortly after you talked to Falkenberg, or...?

LS: Well, it was the second visit, but the first visit he issued an ultimatum. He gave me, some actually, for me impossible ultimatum. One, was find a new place to live,...by the weekend. I believe he saw me on a Thursday, which gave me one day to have a new place to live. Also, to have a job, other than just part-time employment that I had which was also a difficult thing to do especially at that period. I just couldn't seem to talk to the man at all. When he left, I felt entirely frustrated, I felt there was no hope that I could meet these ultimatums. So I stayed right where I was, and continued to try and pursue the job opportunity that I was trying to set up and trying at the same time to get into college. He came out a few weeks later, in which time I'd gone before the council, and they'd agreed to change the law and suprisingly this time I'd expected it to be revoked before then simply because I didn't comply with his ultimatum. And, but this wasn't the case, and he came out to my house and this time it was completely the opposite. He was completely the opposite from the way he was before. He asked, actually asked me questions and was responsive and at least open to answers.

- Q: I see. Now, to move this thing along...something happened that made you leave.
- LS: Yes, sir. Combination of frustration. By that time I was not able to get in school, I didn't have transportation to get to school, the job still hadn't been changed and I wasn't making enough. My parole plan, my desire for parole plan had been to enroll in college and my V.A. entitlement would help me with sustenance and that way I could spend most of my time and some time at part-time jobs and have enough to pay the rent, buy food and stuff like this. And have transportation. Get a little progress. But that didn't work out. All I can say is...
- Q: When did you leave actually?
- LS: I left around the beginning of October, the first part.
- Q: And did you come directly to New York?
- LS: Yes, sir.
- Q: Did you have some plan...
- LS: I may have stopped along the way, I was fairly irrational what I did...again it's hard to explain other than just to say that I was, lacked balance and stability.
- Q: Well, when you went to St. Pete, you had some idea. You rented the place, now when you left St. Pete to come to New York, you had some place to go or...?
- LS: I was just leaving... I was just leaving, I did not intend to come to New York.
- Q: You didn't think about going back to Tampa either.
- LS: No, I didn't think about going back to Tampa. I did eventually when I thought about going to New York, I thought coming back to Tampa. I stopped at a friend of the family's house [and these people weren't acquainted with my situation. I told them at the time all I had was a car and was out of money. I told them that I thought of looking for a job in Mobile and getting some work there. It evolved that this friend of my parents', I believe, had a little recording studio of his own, and he recorded his own music, wrote his own songs and everything like this. I had worked previously in the music industry down in Miami, and I knew that my sister was here in New York in business with a production company and he had these tapes that so impressed me, songs and lyrics, in them that I felt something could be done with. So at this time]

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I decided to, I talked him into letting me take the tapes to New York. To come here to my sister in New York... [] demonstration, and as hare-brained as it was, that's what I did. I came up here to New York with this tape hoping to possibly get something working with good luck, which I was foolish enough to look for, unbelievable luck actually, I hoped to maybe get something arranged so that I could go back down to Florida before a monthly report was due or something and have something working on a business line that would give me a better financial basis to help me out of my troubles which I was having at the time. That was the idea behind it.

Q: Did you actually come to your sister's house?

LS: Yes.

Q: Does she live here in Manhattan?

LS: Yes, sir.

Q: That would be somewhere I suppose in the 14th and thereafter in October.

LS: It was probably a week, close to a week from the time that I left Tampa till I got up here.

Q: Now does that lead us into number two, then, Mr. Shepard? It looks like you were arrested on October 18. The record we have says you were arrested on October 18, 1974.

LS: I think it was that []... I'm not sure.

Q: Yes, the information that we've gotten is that you attempted to hold up the Burger King on Eighth Avenue here, and that you had a gun in your possession.

LS: Yes.

Q: And there was a detective in the Burger King at the same time noticed what you were doing and trying to subdue you, the gun went off. . .

LS: Yes

Q: Apparently nobody got hurt.

LS: No.

Q: You want to tell us a little bit now about what happened on this? We're at the point now where this looks like it might have been a few days after you arrived here....

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- LS: Well, I got here and like I said, this was a period when everybody's business was in trouble. Hers was too, it was right down on the rocks as a matter of fact
- Q: What did she do? She worked for a recording company?
- LS: She is a partner in a production company and recording.
- Q: I see.
- LS: There was nothing I could do with this tape [] I was in New York here for about five days hunting, we went to studios to demonstrate... I was here for about 5 days ... and I was out of money by that time. I wasn't staying with my sister. I was staying in an apartment with an old friend whose apartment was actually under repair, and I eventually got work from the lady [] and I was having trouble with that....it certainly wasn't giving me enough money to live, I was broke and by this time I had gotten about three parking tickets...and I was sure that I was about to be arrested, []
- Q: Did you leave St. Peterburg in the car? In your car?
- LS: Yes.
- Q: I thought you had no transportation to get to school and ...
- LS: Well I didn't up until the point I got a loan from a close family friend which was also Mr. Falkenberg which he disliked. I left Florida in October [] I was in fear of being violated this time mainly because of the tickets, however, the parking tickets [] I was giving up on everything else...[] I would eventually be violated anyway. I was extremely reluctant to return to prison. I went to the Burger King after considering other.... I went to the Burger King crowded as it was rather than rob, some independent place.
- VW: Is there a rationale behind that?
- LS: For robbing the Burger King? [] My rationale behind that was [] I felt independent ... [] wasn't too concerned about Burger King the chain of Burger King [] and I tried to rob this place []
- Q: Where'd the gun come from, Mr. Shepard?

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- LS: Well, these people I was talking about down in Tampa, part of the crowd I felt involved with yet didn't feel was doing any good gave me this gun.
- Q: This was while you were still in Tampa you carried it with you all the time, and had it in St. Pete. Do you know that that in itself is against the rules of your parole?
- LS: Yes, sir, I do.
- Q: Had it ever been used for anything else?
- LS: No.
- Q: According to the record you had some ammunition on you, too...this also what you got in Tampa?
- LS: I believe I brought that []
- Q: So you didn't go back to your sister, apparently, what was... you say you went into the business... was there a particular thing you had in mind. Was that to go back to Florida or to exist here or go on some place else?
- LS: That was to get out of New York. I didn't have gas money. I needed gas money to get out of New York. What I was doing was... I had no way... it was excusable, staying here was irrational and unbalanced []
- Q: Now the actual charges accordingly would have been, you pled guilty to the attempted robbery.
- LS: Attempted robbery, yes.
- Q: Is that a bargaining against the other counts? Attempt to use a fire arm, reckless endangerment... resisting arrest.
- LS: Well, sir, I didn't bargain at all. When I went for my arraignment I plead guilty to what they ... they have me charged with about four different counts. I don't think they...they originally booked me on attempted homicide I believe. I think they are aware that those charges are not relaly applicable. I suppose the attempted robbery that was... there was no question of that. I attempted to hold up the Burger King and I didn't succeed because of the intervention of these police officers. In the struggle the weapon was fired... at the []
... after the place was cleared...[]
] It wasn't pointed at anybody. It was never intended to.
- Q: Did you point it at the girl?
- LS: I pointed it at the girl, yes, sir.

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Q: Was it loaded at that time?

LS: Yes.

VW: []

LS: Well, I think I considered it but obviously not in the right perspective... I felt that I was

VW: I am trying to get where you're coming from. Another thing is that regardless of where you went if you have a loaded gun... some one could get hurt. Regardless of what, if it's a big bank or a small store, you go anywhere with a loaded gun somebody could have gotten hurt....regardless. How much ammunition did you have?

LS: I had about sixty rounds.

VW: Why did you have sixty rounds if you didn't intend to [].

LS: Well, I didn't intend to shoot anybody, for one thing. I didn't even intend to have to point the gun at the girl behind the counter... I had intended rather to approach the manager and have him have one of the girls get something from the cash register. I can not explain this in anyway that it would appear rational, I'd ...

VW: [] You could've gone in with an unloaded gun, and still have gotten plenty of [] whether the gun was loaded or not.

LS: Well, although I had not intended to shoot anybody there were instances in which I decided I would the gun. I would not shoot anybody to get the money... []... but I had not anticipated problems inside the place itself. I had anticipated problems with pursuit... and firing shots to [].

VW: OK, I am trying to get why you were having [].

Q: Anything else that you would like us to know about this particular allegation, Mr. Shepard? You did plead guilty.

LS: Yes, sir.

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Q: You were not on bail, I gather from the record from the time that you were arrested, because it looks as if you entered your plea within a couple of days, you were not sentenced till December but you've been in custody all that time. My reckoning would be that you've been in custody at this point, although the last time [] for ... approximately 27 months. That would be October 1974, again... Alright, just to continue a little bit on that now, when you pled guilty, where did they send you? Did you go strictly to Dannemora first?

LS: No, sir. I went to several places. After they sentenced me, I went to, first to Riker's Island for a few days. Then they sent to Greenhaven for a couple of weeks. From Greenhaven I went to Ossining for a month, and from there I went to Clinton in February. []

Q: Was there any kind of programming or activities... incarceration has been mostly at Clinton.

LS: Yes. All of it.

Q: Nobody was hurt.

LS: No, sir. I... considering after the fact that a lot more came to my mind than it did before the act. Even so, before the act I felt confident that nobody would get hurt, that I did not intend to get hurt... I was [] with myself. I knew what my intentions were.

Q: Let me ask... what will probably be an obvious question to us but perhaps not to yourself, Mr. Shepard, now you left Florida and you came up here. You stayed around for a while. Falkenberg didn't know you were gone. I gather you had no intention of staying here if you could've processed that tape or made some arrangement for going back. Would this be the reason [] why didn't try to contact Federal Probation authorities here? In New York? Just say "here I am", so that they could get in touch with Falkenberg.

LS: You mean when I first got arrested?

Q: Well, no. Even before that. When you found out that your tape wasn't working out and that you weren't living with your sister and you were getting parking tickets...and as you say, you knew that perhaps your revocation was imminent but you in a sense didn't turn yourself in to avoid a lot of what happened later. Anything significant in that or it just didn't occur to you?

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LS: My attempts were to... keep from going back to prison...

Q: And you again, not putting words in your mouth, would probably be still on the run if this hadn't happened. Would be still trying to stay out of prison, if you hadn't been caught. Suppose you'd been successful in the Burger King, and...

LS: Well, I'm kind of glad the way it turned out. I don't think I was... headed in a healthy and...

Q: Well, while you were down at Tampa, were you involved in any other things, and that might be considered... un [] related ... were you using drugs for example? You say you lived or you had acquaintances who were using drugs, you yourself wanted to get away from Tampa because of the environment. And Falkenberg said only about two blocks away there was another drug culture and you should get out of here. Were you using drugs while you were there?

LS: No, sir. And my acquaintances weren't either. It's just that I couldn't form any meaningful relationships with people around me because most of the people were involved in some way or another with this type of stuff. I mean in some, not necessarily an organized fashion, I'm not talking like that, I'm talking about stuff, all kind of garbage that was so prevalent out there on the street and the people in that area were so susceptible to it that I couldn't relate without becoming deeply involved myself. Not only on a legal stand-point, I did not care to get involved in that because I thought it was very damaging. As far as St. Pete went, I had my own house, there were enough people in the area, this was not the area in which I had been raised, there was nobody there that actually knew me... I could easily pick and choose who my acquaintances were, and I do not see the prevalence because of ... the prevalence of the drugs there in that area... it seemed to me that if what Mr. Falkenberg said was true, that it must have been at some time in the past and had recently been diminished a great extent. Police were prevalent in the area... I could go and it was a fairly small community.

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- Q: Let's formalize that a little bit because as I told you earlier, I think the crux of something like this is whether it establishes violation and then of course to look to the future. Let's look at the past a little bit. When you were released from Tallahassee, you went to Tampa?
- LS: Yes.
- Q: Now, what was your plan at that point?
- LS: My plan at that point was to...
- Q: What were you doing? You were on an approved plan according to the record.
- LS: This was where I think my biggest problem came in because although it was an approved plan it was not very established.
- Q: What was the plan?
- LS: The plan was to go to school.
- Q: In the Tampa...area...
- LS: Collect from the VA... woodwork, either one of those. I'm not even sure, I knew what I intended, I'm not sure whether work was one because of school, and I'm pretty sure it was school... It was emphasized because of my entitlement with the V.A. and the help this would give me.
- Q: I'm sure somebody at one time or other before your release, said well, what are you going to do when you leave, normally you go to school and use your G.I. benefits. Where were you going to live? Were you going to live alone, were you going to live with relatives? Were you going to live with your mother... or what?
- LS: Initially I was going to live with relatives... which I did ... until I got established then I would be able to live by myself...
- Q: Were you living with relatives in Tampa, were you living with them when you decided you'd better go to St. Pete? In other words, I'm trying to establish a frame time-wise of when you leave them.

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LS:

I was living at home for about three weeks, then I moved to a garage apartment a couple of miles from... my parents' home... and my brother and I shared the rent there; my younger brother, who was having problems at that time. He was also on probation and he was deeply disturbed after a fashion and I wanted to try and help him...

Q:

Now were you working, was that when you went to work as a cab driver?

LS:

Yes, sir. I had been going to the employment agency and eventually I got a job as a cab driver... The Yellow Cab Company... [] this would lead to my unemployment, it led to my unemployment... because I was driving 7 days a week, 14 hours a day and I refused to take a call. I told them I was too tired, I didn't feel it was safe to drive. They wouldn't let me drive again so I went to another cab company and they hired me. I was worked... for the cab company then.

Q:

I see.

LS:

I was working with them up until the time I came home about 5 o'clock or 4 o'clock in the morning.

Q:

What sort of a job did you have then, or is ... this the work that you were doing when you went to St. Pete?

LS:

Yes.

Q:

There you didn't have that much success in getting a job as a cabby because of the so-called ordinance about ex-con's.

LS:

Uhm... Even so, I [].

Q:

Are you married Mr. Shepard?

LS:

No.

Q:

No dependents.

LS:

No.

Q:

Let's do just a quick jump, we'll come back. Your plan now if you were to go out on parole again apparently is, again, set around going to school. This time at Clinton Community College, right?

LS:

Yes.

Q:

And Clinton Community College is exactly where, Clinton, New York?

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LS: Yes.

GJ: Plattsburg, New York.

Q: Now, I understand that you have been involved in those courses while you were at Clinton.

LS: Yes.

Q: Again, we get down to plans then, ... if you were to go to school as you planned, what would your living plans be. I gather that's not a live-in place if it's a community college.

LS: Well, there are dorms available, but I'd have better success in getting a youth parole plan than any other....[] ... all aspects, all basic aspects of that program before....

Q: This is your state parole plan that you're talking about now? It calls for you to go to Clinton Community, Where does it call for you to live?

LS: Mr. Pete Smith, the general contractor owns an apartment building and he rents apartments to students on a semester basis and he guarantees that he will have a place for me to rent on that basis.

GJ: Mr. Hearing Officer, I would give you a copy of the letter from Mr. Smith, guaranteeing housing as well as part-time employment. I think it might be appropriate for me to say at this point that I spoke to Mr. Smith yesterday on the phone. He sent me another letter reaffirming his commitment for employment and in addition, he told me that the commitment for employment would be such that he would still be able to go to school. He'd had construction work that Mr. Shepard could do... in the evenings, late afternoons, or on the weekend, so that he'd be able to work and then go to school at the same time. Unfortunately because of the mail service the latter hasn't made it to my office.... but the commitment in this letter which is dated October 3, 1976, has been reaffirmed by Mr. Smith.

Q: I see. May we have this letter? Thank you.

LS: Now, that's part of it. I'm already enrolled in Clinton Community and I've been participating behind the walls on a full-time basis for the last year and a half and have completed 37 credits.

Q: What's your major goal in your education. What can you get out of community college, an A.A. degree?

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- LS: It would be an Associate A.S. degree, associate in science. I intend to continue, I have my V.A. benefits extended through '79... While I'm here in New York, I am also... have been receiving grants, state grant, Tap award, and federal grant which effectively almost cover my entire tuition.
- Q: Have you received this?
- LS: Yes, I've been receiving it for the last year and a half. As well as my V.A. entitlement. This allows me to use almost every penny of my V.A. entitlement for my sustenance, and this would go... and I have saved money. I have... literally, [] some difference in the parole plan. I have saved money for a start and I would be doing this on a monthly basis except for the 292 from the VA, and I would have that part-time work. Whatever I received from that, that would be mine for sustenance and my tuition would be almost completely covered by ...
- Q: How long do you think it will take you to complete the courses that you're taking at Clinton?
- LS: I believe that I can have my A.S. within a year. I don't see any reason why I shouldn't. I can take more courses, I've been limited to 12 hours... and ...
- Q: And you're going on. What's your major?
- LS: I have not effectively gotten into my major yet. I hope to continue past my Bachelor's in marine biology. This would effect a move eventually to another university in another place. I owe the state two years on parole.
- Q: Until October 1978, I believe.
- LS: Yes. I would eventually expect to move. I would like to major in marine biology. It took me a while to find an area that I felt capable of, any area but only capable of pursuing an area that met my interest. Marine biology seems to be a wide open field and my school counselor feels it's a good area to pursue and it's something that interests me deeply. Marine biology and related oceanography and stuff. And as a second major I have to find... []
- Q: So, as far as you can see, living-wise, goal-wise, far as school is concern, you are a lot better off than when you went down to Tampa some two years ago.

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LS: Yes, sir. I'm convinced of it. I've... []

Q: Alright Mr. Shepard, I think you know, we told you again, I don't like to repeat, but we have to come up with an ultimate decision, which may mean parole or not to parole, the reasons for and the reason why not. So lets's get into some little things that I'm sure you can answer... Now, you had the G.I. Bill before...

TAPE ENDS

Q: Is there any reason why you could not have enrolled in that type of plan and cancelled if events....

LS: That was my intention.

Q: What prevented you then and now?

LS: My problem was meeting the requirements of living out there at that time, and not having a plan already established. Not having the enrollment, [] I had never been in a college, I had a high school GED... I hadn't been to high school for so long... I had problem with transportation to the point where I effectively... transportation was only one of my problems.

Q: Well it looks a little better for you now...with your thinking now I guess [] certainly now that you got into it... you had to stop long enough to get into it. And now that you're into it that's why it might not be a bad field. Now, Mr. Shepard, we do have information... in your file that overall you've been doing very well indeed at Clinton particularly in the efforts in the education field. Would you tell me briefly what other programming has been going on at Clinton other than your time at college.

LS: I was involved in classes outside, I couldn't get a job. My first job at Clinton was as counselor. They interviewed me for a job and I found out that I could speak Spanish. And they had a situation where they needed a clerk and one that could also translate for me, because there are a lot of Spanish-speaking inmates there. I originally got a job in the service unit where all the counselors work. I was the only inmate working there. And I was translating for them []. I got into counseling sessions on a daily basis with my counselor there. Because of that opportunity, as well as with other counselors... that is what started the thing. Eventually, I moved from there to a job involved typing as an ass't clerk in

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LS: the store room and I wanted to improve my typing skill because I had hoped that someday, I have and inclination wanted to write. But a [] would improve my typing skills [] and I was trying to fit things so that [] my daily actions [].

Q: Do you have a clear conduct record there?

LS: Yes. I have two...one minor infraction... A guy notorious for giving out infractions went in my room one day and decided to write me up for the coat hangers that I had hung my clothes.

Q: Was that contraband, or you did you have them hanging the wrong way?

LS: No, it's classified as contraband, it was something that you... they were all over the joint... and the laundry brings them to you but they're supposed to be turned back in to the laundry. This has changed, the laundry is being done somewhere else, and these coat hangers everybody can use. But he wrote me up for having an unauthorized coat hanger, and that's the extent of it. I moved from Clinton Main to Clinton Annex which is medium security and they gave me a job at the clinic where I continued to improve my typing skills. There was an officer there, I was in the presence of an officer and a nurse all day. This nurse was a psychiatric nurse, too, and I worked with the nurse and the officer for approximately a year. This officer was also in trained in things like [] and stuff. We developed in my view a pretty meaningful relationship over the year, so I learned to deal with a lot of frustration and administrative frustration, too, that previously I hadn't... but these people felt [] and the work [] and at the same time I had begun participating while in Clinton in the school program. It took me a while to get in to that, that was something which took place four nights a week. I was going to school for four nights a week at the Annex, too. At the Annex I had to come from the Annex back over into the prison every night for school.

Q: Were you in any kind of formal psychiatric or psychological counseling?

LS: There was other than my, my opportunities were actually better than anybody that was in such programs. There were no real programs for psychological counseling. There was a situation where according to need, a person could see Dr. Reyes, the psychiatrist, and talk to her, generally people with...having such a hard time that they needed some kind of medication. I received

(Cont'd)

LS: the benefit of her help, but not in a formally recognized program. I was working for her...

Q: Dr. Reyes? R-e-y-e-s-?

LS: Reyes. Yes... she also wrote a report on me.

Q: I asked that ...because in looking back we look to the future. We do know as you have already told us that originally you were released on parole earlier, at least you would have been released on parole if you went out to the halfway house, and that didn't work. What happened? What happened that blew that?

LS: Well, that situation is... I'll explain it to you from my point of view. I was scheduled to go down to the halfway house for four months. They had requested.... the halfway house had written them, requested.... asked if it would be better if I were put in a drug program. It had a drug program which was separate from the halfway house.

Q: Was this the good will suncoast?

LS: Yes, this was the good will suncoast. And my case-worker informed me that I was not to be put into the drug program, the intention was for me to go down there to find work, to find a job...get established in a job. Not to go to the drug program. And when I got down there, in spite of what Tallahassee told me, they put me in the drug program anyway. And in this place, this was a... it's hard to describe the place. It was a little emergency hospital when I was there. There were several juveniles there who were... some of them even voluntarily for drug program treatment. But it was a very restrictive thing, I couldn't even go out of the building for a week, which was no way in line with my purposes. I didn't need detoxification, I needed to go out and find work. Which through... this program I couldn't and they did not want to let me out of it, they resisted it. I don't know why, I'm not sure, I have my ideas about it, but they're not necessarily correct. But I told them that I wanted to go to be. They eventually called Tallahassee more as a, I think, more as a threat to me than anything else, but that's exactly what I wanted them to do and the minute they did, Tallahassee told them to put me in a halfway house. By the time I got to the halfway house, which was like a week after I'd been down there, I got involved with a counselor there who I feel that they resented me having forced the issue... I immediately felt that I was walking the line. In other words, my counselor started interrupting and holding back on my allowance which was supposed to be a weekly thing, and not to be controlled by them, simply administered by them. And I definitely felt that I was being pressured.

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- Q: What was the thing that finally...
- LS: The thing that finally did it was I had spent the night at my brother's house and ...
- Q: And that was a curfew violation?
- LS: Yes. It was a curfew violation, and I came back the next morning and they called the marshal, they had the marshal come and get me...
- Q: Have you...in your early life had problems, have you used drugs in the past. What's been going on in your life that now has changed because I'm showing the 64-dollar question to you now? What's so different about you now, Mr. Shepard, that as you see it will success as against two or three years ago it looked to be a series of failure.
- LS: Well, I feel that at this stage of my life, many problems occurred because of great emotional imbalance...emotional and psychological imbalance that was more or less, I feel, in my reflections, manifested during my adolescence ...adolescent period, there are reasons for this in my background. I believe, that you might be aware of, I don't know if I have to go into that or not. It was part of childhood experiences...
- Q: That your father criticized you.
- LS: Yes, sir. Partly. And I went through... a lot of problems... [] when I was going through heavy depression, emotional depression, I wanted to resign from the world. I didn't want to have anything to do with it. I did eventually become involved in taking some drugs, alcohol I got fairly involved with while I was in the military...and although I don't feel that the problems necessarily stem from drugs. I don't think they stemmed at all from drugs... my use of those was limited especially and particularly [] drugs were more or less experimental than anything for me in my ...
- Q: Did you use hard drugs? Heroin, cocaine?
- LS: I have listed that I snorted heroin one time and I snorted cocaine one time, I took acid two times, LSD two times, and I used marijuana on frequent occasions during periods in the past.
- Q: But this is not a problem that you can't overcome, it's not an addiction type of thing...

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- LS: No, sir. I've never been addicted to drugs. I did have a problem with alcohol.
- VW: What does that mean?
- LS: I feel that, hopefully through my reflections I've been trying to get to the root of my emotional problems, because the trouble that I've been in for the last few years...it's almost undefinable, the extremes that it's gone through and I don't feel that it's necessary that I spend the rest of my life in prison, in and out of prison and stuff like this. I don't feel inclined to ... I don't feel particularly inclined to a particular criminal way of life, you know I feel I must follow. Before I started... []. So, I'm trying to find the problems that led me into this situation, and in doing so I hope I will have enough success at understanding them. But, I can cope with the alcohol problem as well. That is actually more in the past, it's hard to say that simply because I've been in prison I haven't had anything to drink...
- VW: You say you've concerned about [] being available. However, when you committed the offense [] were you on alcohol then?
- LS: I was [].
- VW: In other words, alcohol [] is the problem.
- LS: The alcohol gets me in trouble with the problem, and I can't say that because I haven't had anything to drink for two years that it isn't necessarily going to be a problem. I have to consider the problem.
- Q: Were you in any kind of A.A. therapy at Clinton? Or was that not available?
- LS: I did participate in A.A. there.
- Q: Or do you think you could use that kind of stuff, Mr. Shepard?....
- LS: I don't think it would really help. I had a brother that was in... I feel that... rooting out the problem, my emotional problem and effectively learning to function in those... I think I've had some success because I regard alcohol as a symptom more than a cause. I feel that I've had success even though I was drinking at the time of that crime. I think the absence of alcohol wouldn't have made any difference. I'm not trying to vindicate alcohol. I feel that my problem there is not major, or hasn't been major. I felt that it could be if something weren't done to achieve a better balance for myself all the way around. I can't stand the thought of just walking out and going back, that's why I work so hard in trying to get a program together...

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VW: [

LS: That's possibility... I'm very wary at this point of alcohol. I don't intend to allow it to manipulate me.
[]

VW: []

Q: Well, I have one other here and I just want to make sure that Mr. Shepard gets the benefit of everything. Mr. Haley could not be here.

LS: Right.

Q: Mr. Shepard, if Mr. Haley was here, what would he say?

LS: Mr. Haley... I consulted him fairly regularly on what I was doing and where ... I'm sure he felt that I made some progress. And that I have a very good prognosis.

Q: What was his official... now is he a correctional counselor? Was he the head of your unit? Or whatever?

LS: When I was in prison last year or so, I also knew him in Clinton Main. I spent over a year there at the Annex. After I came to the Annex, he came to the Annex, and was assigned to me and he was my counselor.

Q: So you've known him for a good bit of the time you were at Clinton.

LS: Yes, sir. I've known him for the whole time.

Q: He would attest to what you feel would be an overall appraisal of your adjustment there as very good?

LS: Yes, sir. I'm sure that he would. As far as I know, anybody that was involved with me there, I got nothing but good feedback and on my efforts, on all my efforts, even including the parole board and school counselors, my officers, my [] officers. I have no reason to feel that any of them would say otherwise.

VW: I have one more question.

GJ: I think, if I may interrupt for a moment, Mr. Haley's given me a letter that we ... he wrote to the Parole Board in which he says that Mr. Shepard at this maintains a record of excellent institutional adjustment. The letter is dated October 4, 1976. He goes on to say that in the opinion of this writer, Mr. Haley, Lyman has undergone significant personal growth while incarcerated and has learned to direct his energies toward a viable self-improvement program. Despite numerous obstacles, his overall attitude has been positive. In his cover letter to me enclosing this letter he

expresses his hope that Mr. Shepard obtain a favorable decision from the board. I have provided a copy of these letters for the hearing. Again, I spoke to Mr. Haley... [] during December and he again expressed to me that Mr. Shepard made an excellent adjustment to the institution, and made serious personal changes, and in his opinion would ready at this point for parole. He felt that Mr. Shepard, much as any other inmate he had ever known...could succeed on his parole at this time.

Q: Also, from what we've been talking about, had the records that Mr. Johnson is anxious to subpoena, would they say pretty much that you have told us about your programming there, your schooling?

LS: I'm not sure exactly what the record would consist of, what various reports the record would consist of. As far as my adjustment there, my involvement there, and my progress there, I am convinced that they would be a favorable report. There are reports that I would like, prefer you to see, such as the analysis by a psychiatrist, and stuff like this that I feel could add more...

Q: Have you seen those reports yourself?

LS: No, sir, but I have the parole board, the state parole board's opinion of the effect of those reports.

Q: What do they say? Is there again indicating a little bit about what Mr. Haley says that you now have undergone changes from the old Mr. Shepard to the new Mr. Shepard?

LS: Yes, sir. That's more or less the impression I received. The parole board was, [] I couldn't believe they didn't even ask me questions. They, except at the end, they asked me if I had any questions. They [] [ring] ... so I would assume that the record is fairly good.

Q: Mr. Shepard, is reasonable to assume that had you not had the good adjustment as you see it that you would not have been paroled by the state? That they would in fact have carried you through to your minimum expiration time and then released you to that detainer. Rather than saying, "Well, we've got a detainer, we might as well parole him because he's in," I'm just trying to get your appreciation of whether you really earned that parole out of Clinton on the basis of what you did, not because there was a detainer and there was some other holds about to take place at a future time.

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LS: Well, let me say two things... in regard... to that. First, the only way that I can judge by that is the first time I went to the parole board for them to set my minimum release date. It wasn't a very favorable hearing to me. They set my minimum at two years which was the maximum they could set it at. This was before adjustment could be accounted for, before program results...

Q: Almost at the classification time.

LS: Yes, in other words, they effectively set my minimum at two years, where the court had declined to do that. When I returned to the parole board in November of last year, they seemed very, very pleased with my progress... but they especially with regard to the school and to my record, my academic record. They expressed a desire to parole me since it was my intention to continue such a program. As a matter of fact, they never once even mentioned a warrant. At the end of this, which only lasted about a minute or two minutes, he was just doing the talking... telling me and I responded as far as my intentions. He asked me at the end after indicating that they would probably parole me, if I had any questions and I asked just one. My minimum release date was December 25th. I asked him, the parole board [], if they were going to, if they were considering releasing me. I asked them if they would consider releasing me between semesters so that I might have a little time to get established. Even though things were fairly well set up, there's a certain amount of adjustment... in anything so simple as buying clothes and stuff like that. But I asked them was just if they would release me between semesters. And he asked me when would that be. I told him that my present semester would be coming to an end towards the middle of the month, towards the middle of December. He took it down, he noted it and he said they will take that into consideration. They gave me a parole date for December 15 that's approximately ten days short of my minimum release date as set by the parole board previously. I feel that they were...

Q: They were doing it on the basis of what you had accomplished, whether or not there would be any sort of a hold.

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- GJ: I think, here's a copy of Mr. Shepard's parole slip. As a matter of interpretation, the decision at the bottom, ODOP 12-15-76 through 5-77 2D. That means Open Date Open Program as of December 15, 1976. 5-77 Board means that if the program should not be approved by the filed parole office up there, he again meet the board. And program six refers to his program with [] college and work part-time with Peter Smith in construction. So the decision here was definitely made on the basis of his program and not for the warrant.
- Q: I see. That's what I was looking for. May I ask you Mr. Shepard, when does this next semester start, or has it already started at Clinton?
- LS: Well, Mr. Johnson informs me that he called my school counselor there that, Mr. Woodward, my school counselor said that registration begins on the 17th....
- GJ: Registration is the 17th, and classes begin the 19th, but it would be possible for him to register late.
- Q: I see [].... you wouldn't necessarily have to miss the whole semester, if you couldn't meet registration or starting date.
- LS: No, sir. I don't think so.
- Q: Well, suppose you did, would you be working for Smith in between [] to gather a little more....
- LS: Well, that would be definite. That would be my only alternative. At that point for sustenance, to work as much as possible.
- Q: You're going to stay around and go to Clinton, is what you're saying.
- LS: Yes, sir.
- Q: That's solid.
- LS: I have accrued a certain amount of savings that could help in respect to this. I hate to miss a semester.... because... but there are reasons
- Q: If it did come to that, I'm trying to establish again, plan, ... would you have forfeited your right to go to school if you did not get released in time for the starting date of registration. Apparently, no. You can register late and you can start late...
- LS: I believe it's feasible up to a certain point.

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- VW: []
- Q: But even if you couldn't meet that deadline, your plan would still be to go to Clinton.
- LS: My plan would still be to go to Clinton. I'd be missing a semester...
- Q: Mr. Johnson, would you want to introduce any of your character witnesses at this time...
- GJ: Yes, I would. I do have some letters. I don't know what papers the board has before it and perhaps this would also simplify matters if I could have disclosed exactly what papers, in particular what institutional reports you have before you.
- Q: All right, let me tell you what we have readily on hand here.
- LS: If we're going to be a while longer I have to go to the bathroom.. If not and there are other questions for me...
- Q: Well, I don't know... I'll tell you what we can do. I think maybe the Government should go and we'll cut it off right here, and in the mean time we'll discuss your strategy with Mr. Johnson about bringing witnesses in. All right?
- GJ: I would just ask that the transcript should reflect that you have before you a letter from James Williams... excuse me, from Fred Woodward Coordinator Inmate's Higher Education Program.
- Q: Yes, sir. We have that.
- GJ: A letter dated July 22, 1976, from James B. Pletcher, the Vice President for Academic Affairs. Both of those letters...
- Q: Yes, sir.
- GJ: Both of those letters relating to Mr. Shepard's excellent performance in college.
- Q: See you made the Dean's list, Mr. Shepard.
- LS: Yes.
- GJ: And also you have a copy of the transcript from Mr. Shepard's studies indicating 4.0 average.

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- Q: Yes, sir. We have that.
- GJ: I would also like the transcript to reflect that the only communication in the record from Mr. Haley's letter dated October 14, 1976, and the covering letter which...I submitted dated November 10, 1976.
- Q: That would seem to be the case, Mr. Johnson, on our review of the record and unless this decision here somewhat perhaps out of chrono, we do have Mr. Haley's letter of October 14, 1976 which at the moment seems to be the only one that I can find. And we have, you have presented us with a copy of that again.
- GJ: I think that it's clear that there are no psychological reports or other institutional reports compiled during his stay while at Clinton.
- Q: There does not seem to be in the file that we have.
- GJ: One final thing and then I think that we can then produce witnesses who are waiting outside. Ms. Amy told me that she had also prepared a report... is that report before the board?
- Q: Well, I don't know what report you are referring to. Is this the one. Yes, we have this.
- GJ: May I have that report as well, please.
- Q: Yes. I see nothing in here that is subject...
- Q: This is normal procedure, Ms. Amy.
- GJ: Thank you... If I may just inquire what procedure that you would like to have followed regarding these two witnesses.
- Q: All right, sir. Mr. Johnson, if you will bring them in and introduce then we will need for the record their names and I will leave it to you then to elicit from them any comments you want...if you have any questions.
- GJ: Fine. []
- Q: Oh, no. I don't think you will be in that long, Mr. Shepard. All right, Mr. Johnson. If you would proceed, we're on record.
- GJ: Just introduce yourself.
- JS: I am Janet Shepard.
- Q: Janet Shepard.

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JS: I am Lyman's sister.

Q: And your address, Ms. Shepard.

JS: 345 West 58th Street, Apt. 15M

Q: New York City?

JS: Right. Zip code 10019.

[Unintelligible]

Q: All right, proceed.

?: []

DS: Diane Lyman Shepard.

Q: Are you his sister, too?

DS: Um-hm. And my address is [] Wurtsorn Street.

Q: What, spell it.

DS: W-u-r-t-s-c-o-r-n.

Q: All right.

DS: []

Q: Thank you.

GJ: I think to make things clear in the transcript I will address you by your first names. Diane, how frequently were you visiting Lyman while he is incarcerated?

DS: Well about once a month, at least. I spent the winter part of the winter in New York, part was in Florida so I'd write when I was down there. But when I was up here I'd try to... at least once a month, sometimes.... one time I visited five days [].

GJ: Tell me, you've been able to speak to Lyman during this post [] period.

DS: Yes.

GJ: How do you think he's adjusted? How do you think...

DS: Definitely, definitely changed [] I guess his own records will show that. You know, he's been a lot stronger of a person than he was before. He's a very strong member of the family. The whole family attitude has gone up [].

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GJ: How do you feel? Is there anything changed?

DS: Oh, I just ... oh, I feel a lot closer to him...
in fact we've been able to relate. Every time I
went to visit we've been able to relate. It's been
good for me everytime I've went because we've been
able to relate, and how we've grown, you know []
as time goes on, you just grow, you develop, and its
been a good experience for me as well [].

GJ: How do you think he's felt.

DS: Well, he felt more direction [] and that always
makes a person's life change. []

GJ: How would you say he compares with how he was when
in Florida?

DS: [] he knows himself better than []

GJ: How old are you?

DS: Twenty-two.

GJ: If Lyman were paroled, then returns to Plattsburgh, do
you think you might keep in touch with him.

DS: Oh, sure, sure.

GJ: Do you think that the fact that you've been able to visit
with him [unintelligible]

DS: Yes, [] mental and physical and both

GJ: [Unintelligible]

DS: [Unintelligible]...Well, right now, I'm going to have
a baby, so I'm not really employed in that sense []
[] my old boss I'm going to be painting some signs
for him, but its nothing like a permanent, steady job.

Q: How far is []

DS: [Unintelligible]... is about 80 miles northwest of here;
Now from, Plattsburgh, Plattsburgh is about [] miles
from here.

Q: [Unintelligible] Well, following up on Mr. Johnson,
you'd be staying in touch with your brother while he's
at Plattsburg, and I figure you'll be living in
[] now.

DS: We're pretty close to 2-250 something like that

Q: You'd be available if needed. I gather.

DS: Oh, definitely.

Q: Rather than 250 miles every other day

DS: (Laughter) []

Q: []

DS: (Laughter)

C: That's all I have to say, Mr. Johnson.

GJ: What... you're married?

DS: Uh-uh.

Janet, what business are you involved in here in New York.

JS: Uh, records.

GJ: What exactly do you []?

JS: Produce and manufacture, my own label...

GJ: You were here when Lyman came to New York about 2 years ago.

JS: Right, um-hmm.

GJ: What happened to your knowledge to Lyman while he was in Florida?

JS: Uh, from what I saw, not only are the opportunities in Florida pretty bad [] back then, [unintelligible] as far as employment and everything, but Lyman's situation personally was very desperate trying to find work, uh, I remember when I was talking to him on the phone, I ... when he had gotten off... I was there on a visit for about a week, so I saw him, and then when I came back up to New York, and he was still struggling trying to find a job I can just remember the the desperation, of ... one of the men who kept promising him and never came through. I remember he borrowed money for his car, he didn't have a place to live or a car... so both necessities in Florida, because it is so spread out so in order to get enrolled in school and everything he had to have a car, so he borrowed \$800, something like that, from my mother's best friend who he's repaid. But at the time, it was my mother's closest family friends for all these years, and he was very depressed not being able to pay her back, the way he wanted to, and on time and everything. So that was

Cont'd

DS: bothering him. And it was just...nothing seemed to be... the timing was wrong, the opportunities were not there, and desperation set in and [unintelligible]. So I ... in a very desperate situation, and it was a lot different from what is happening now, you know, the difference between night and day, but, uh, [unintelligible]... about two and half years.

GJ: What did you talk about?

JS: [] not only have an objective, like Diane said, he is not as confused within himself as far as what he wants to do, he knows what he wants to do, he can do, he's been going to school, he's got about 37 credits in school, he likes it, he's a good student, he's an excellent student, and he's also been working on political... in Dannemora, which he didn't have, he had nothing at all going in Florida, and the south is in pretty bad shape anyway economically and I just think it's a whole world of difference, being up here, being in school and in a program and he seems to much clearer thinking. I've been in touch by letter with him ever since he first went up to Dannemora, and his attitude today has changed much for the better. He seems to be able to face adversity much better than a few years ago. He's much more of an adult, and I'm a little bit more of an adult myself, so I can see it, and I think he can be much more responsible for his own actions. ... On some of those actions that happened he may not have a choice, you know, in the matter because [] ... face those decisions pretty well too.

GJ: You've said he's changed quite a bit.

JS: Quite a bit.

GJ: Do you think he has a realistic attitude now.

JS: Yes, I think he's realistic... well, as much as a person can be when they're not exactly in control of the situation, I think he's very realistic ... I feel a big difference... to me... the timing was bad and every thing else a couple of years ago, and when you grow a little older -- you know, he was a very young adult then -- he's a little bit more of an adult now, and knows what it means a lot more, and when you're in that age of the early 20's mid-20's, every year is crucial, every year you grow much more.

GJ: Do you think, also, that you and your sister now are able to help him now.

- JS: Oh yes [background - two people answering] ... he was still living at home; we have a sister living in Hawaii, that has [] her husband is in the air force; [] the youngest of the Shepard boys; there is 6 Shepards in the family and then 2 [], one a step sister and one a half brother [] The youngest of the Shepard boys has been trouble ... not ... he's been in a drug related problems, he's in a rehabilitation for [unintelligible].
- GJ: Do you think that the family is in the position to give Lyman support?
- JS: Much better position... 2 or 3 years ago there was a pretty unstable atmosphere with most of the family, my mother...
- DS: Yeah, my sister [] the whole family was having trouble. This is really definite my mother the last 6 months has been so good (laugh) []
- JS: Yeah, she's looking forward to retirement now which is nice after raising 8 children. And they bought some property in the Blue Ridge Mountains which they're looking forward to building on and everything, so she quite... feeling much better about that one [] much, more, much more. They're also getting older, everybody's getting older, everybody is getting out of their adolescence.
- GJ: I have nothing further at this time, I believe, if I may just consult with Mr. Shepard.
- LS: I want to say that my family is greatly responsible [] love or without their moral support and Diane in particular []
- Q: Anything further you'd like to bring up, Mr. Johnson? Do you want to make a closing statement at this time, or summary at this time?
- GJ: I'd like to make a brief summary. Uh, Mr. Shepard [] whether or not Mr. Shepard now, during this time, the last two years, has made a significant change, where it would be appropriate to release him. I wish that we did have the record from Clinton to present to you. But, I think that you got the flavor of him, and you got one or two documents, which indicate that Mr. Shepard is ... when it gets down to it, is a new person. He has direction, he has a goal, he has a realistic assessment of what he has to do and what he can do. I think that under the parole program that he's worked out, which involved going to Clinton Community College and working in Peter Smith's firm in Plattsburgh, gives him a sound grounding for success on parole.

I think that two years ago, when Mr. Shepard was released, he wasn't prepared for release. Wrong time period, and now though, fortunately, the type of program he went through at Clinton, now is the time when I think he is ready. His family's secure, his family is now available to help him deal with his problems, whereas a couple years ago that wasn't ... He's received intensive psychological help at Clinton, as a result of his job at the clinic and his contacts, his real life contacts, with Mr. Haley. And I think as Mr. Shepard put it, he now he's begun to understand, he does understand the emotional problems he was having and learned to deal with them. I think he's exhibited tremendous amount of growth now. I think it would be appropriate not to interrupt rehabilitation program that is already in existence. New York State has paroled him because they feel that now is the time, now he has got [] in terms of his chance to make it on parole, make it as a good member of society. He's been working at this program for several years while incarcerated, and in fact New York State was so impressed that they released him a few days early, which is quite unusual. I think that to interrupt this program [] would be inappropriate. It just wouldn't make sense because he's come a long way. He may have a little bit further to go, but he's moving in the right direction. And I think that [] rehabilitation that direction should be continued it can be continued by a favorable decision.

Q: Mr. Johnson, we thank you very much. Thank you, ladies. Mr. Shepard, if you'll stand outside now we'll discuss the situation; we'll call you back Mr. Shepard and Mr. Johnson.

Q: Mr. Shepard, Mrs. Van Waldraven and I have now completed our deliberations in this case, and we are prepared to give you two tentative decisions, and I would again remind you that whatever we give you decision-wise has to be reviewed at our regional office. You will get the official decision, as I told you, within 21 days. [] And you have a right appeal our decisions. Our first decision is to revoke your parole. We are revoking it strictly on the admissions to the first two charges. We are not making findings in any of the other, what would have been the admitted other violation, the possession of a gun or perhaps failure to report since you had left the district without permission. But we are basing it on leaving the district without permission and to conviction for attempted robbery. Now, in

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your particular case there will be no decision that we will normally be making as to time spent on parole credited as your time as running anyway. So that does not apply. The third decision that we give you is really based on what the Commission now provides, namely reparole guidelines, from which we must assess and classify the parole violation behavior either as an administrative violation or as a violation of new criminal conduct, and be guided accordingly. Well, your parole violation has been classified, of course, as new criminal conduct, a new offense. In looking at the offense, we took up the philosophy of the Commission as to what we call offense behavior, you remember the old guidelines, [LS: I do remember them.] and we have decided, and again, this is a tentative decision, that we would place the conduct in the greatest severity range, because of the fact that a weapon was discharged in the commission of a felony. Now, we have given you credit for 27 months, in state and federal custody, from the time of your arrest on that offense. The reparole guidelines would call for service of at least 48 months, because the computation is made on the greatest, there being no maximum time, as you probably know, a minimum suggested time of 48, which would be the top figure under "very high" which would be the maximum type. You, of course, have some 14 or 15 months left on your sentence. Any decision that we would give you that would be favorable would have to be considerably below those guidelines, by time. We have given you tentatively a decision below those guidelines. The tentative decision is to reparole you effective March 15, 1977 with an approved plan. I don't think we have to dwell too much on the approved plan; it would be the same plan, I presume, you have with the state. The March 15 date, of course, is the customary time for processing. I would hope, we talked a little earlier about whether you can register late, whether you could get in late. I don't what impact that would have. I think a more immediate impact would be the review process here. The review is conducted by the administrative hearing examiner and the regional commissioner. The regional commissioner now, under the new procedures, must review all paroles individually himself. It goes through a screening process. In any event, all greatest category are reviewed by the parole commission so you are going to be under double review. This, as you know, is quite a bit below the guidelines. As a matter of fact, you wouldn't even reach the bottom of the guidelines before your term would run. We've tried to justify it on the basis that, although there was a weapon discharged in the commission of a robbery, it was

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unintentionally discharged, as we find. It was done in a scuffle, I believe. You have no prior history of violence. You have achieved what we believe to be an outstanding record while in state confinement, and have a solid and viable release plan. Now, whether or not in all circumstances this would be adopted as an official position I don't know. I bring it to your attention because the review process is very strenuous and stringent so you may not get back the []. I'd add, the way we see it now is to revoke the parole for the reasons I gave you and to reparole you in a couple of months, on March 15, 1977 with the approved plan. Now I know we don't put an approved plan in there we want to stress that, because it is a plan and much of this will be going into our summary, which of course will be the guiding document for the review. Are there any questions about this?

LS: []

Q: Mr. Johnson?

GJ: I have just one question. I have the letter from Mr. Smith, will be arriving in my office, probably tomorrow, []

Q: Send it on to me.

[]

GJ: Will Mr. Shepard be provided with a written... By what time will he be provided with a written copy of...

Q: Hopefully, he'll... Well, he won't get anything from us, a tentative decision. He'll get a final decision, which may be what we have given as the tentative decision, and may not be. There are two decisions to be reviewed -- one on the revocation, and then one on what we call the alternate.

VW: If he does [], then his release from the federal custody can be worked out with the state [], a furlough [] or whatever can be worked out []

GJ: Thank you very much.

VW: Good luck.

Q: Good luck to Mr. Shepard.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GEORGE EARL WALTON,
Petitioner,
v.
EDWARD H. LEVI, et al.,
Respondents.

No. C-76-1806 WWS
ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

Petitioner, who is confined at the Federal Youth Center at Pleasanton, California, contends that the then United States Board of Parole (now the United States Parole Commission) erroneously denied him parole. This Court has jurisdiction under 28 U.S.C. Sec. 2241. Petitioner has exhausted his administrative remedies by appeal to the National Appeals Board.

The gravamen of petitioner's complaint is that in denying petitioner parole, the Board erroneously took into consideration the severity of the offense of which he was convicted. Petitioner had been convicted of violating 21 U.S.C. Sec. 841(a)(1) and was sentenced under the Federal Youth Corrections Act. After having been committed, petitioner was granted a parole hearing in July 1975. By order dated August 15, 1975, the Board denied parole, stating, among other reasons

"Your offense behavior has been rated as very high severity."

Petitioner argues that the Federal Youth Corrections Act precludes consideration of the severity of the offense in the making of parole decisions, relying principally on a statement found in Dorszynski v. United States, 418 U.S. 424, 434 (1974):

"An important element of the program was that once a person was committed for treatment under the Act, the execution of sentence was to fit the person, not the crime for which he was convicted."

But Dorszynski does not address the question whether the Board's guidelines, which among other things take into account the severity of the offense, may be applied to youth offenders. See, 28 C.F.R. Sec. 2.20. While some decisions questioned the propriety of this practice in the past^{1/}, Congress in 1976 removed whatever doubt there may have existed by amendment of Title 18. Section 5017(a), as amended, now states

"The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of Section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission."

Section 4206(a) of Title 18, added by Public Law 94233, March 15, 1976, states the general parole determination criteria as follows:

"If an eligible prisoner has substantially obeyed the rules of the institution or institutions to which he has been confined, and if the commission, upon consideration of the nature and circumstances of the offense and the history

1/ United States ex rel. Mayet v. Sigler, 403 F.Supp. 1243 (M.D. Pa. 1975) (on appeal to the Third Circuit); Fletcher v. Levi, C-75-2064 (D.D.C. Jan. 16, 1976). Contra, Barr v. United States, 415 F.Supp. 990 (W.D. Okla. 1976).

1 and characteristics of the prisoner, determines:

2 (1) that release would not depreciate the
3 seriousness of his offense or promote disrespect
4 for the law; and

5 (2) that release would not jeopardize the
6 public welfare;

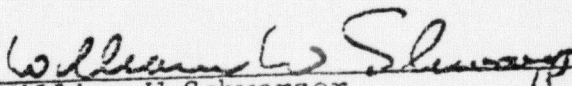
7 * * * pursuant to guidelines promulgated by the
8 commission pursuant to section 4203(c)(1), such
9 prisoner shall be released." (Emphasis added.)

10 From the foregoing, it is clear that the Board
11 may now apply its guidelines, including consideration of
12 the severity of the offense, in making parole determina-
13 tions. The legislative history of the 1976 amendments
14 reflects a broad remedial purpose to improve the parole
15 decision making process. 1976 U.S. Code Congressional
16 Service, pp. 583 et seq. H. Conf. Rep. 94-838. We see
17 no reason why petitioner's parole should not be governed
18 by the principles embodied in the 1976 amendments.

19 Accordingly, IT IS ORDERED that the motion for
20 leave to proceed in forma pauperis be and it hereby is
21 granted;

22 IT IS FURTHER ORDERED that the petition for a
23 writ of habeas corpus be and it hereby is denied.

24 Dated: December 8, 1976.

25 
26 William W. Schwarzer
27 United States District Judge
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U S Atty
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 76-1242-Civ-CA

ROBERT BRYANT MC KAY :

v. :

• ORDER OF DISMISSAL

UNITED STATES OF AMERICA :

I.

Robert Bryant McKay has filed a Petition for a Writ of Habeas Corpus pursuant to Title 28, U.S.C. §2241(E)(3) attacking his confinement in the Federal Correctional Institution at Miami, Florida as being violative of the spirit and provisions of the Youth Corrections Act (Y.C.A.)¹ and the Fourteenth Amendment to the United States Constitution.

On December 18, 1975, pursuant to a Rule 20 Plea of guilty to the offense of embezzlement and conversion to his own use of . . . monies of the First Bank and Trust Company, Providence, Rhode Island, in violation of Title 18, U.S.C. §656, petitioner was committed to the custody of the Attorney General for treatment and supervision pursuant to Title 18, U.S.C. §5010(b)², until discharged by the Youth Correction Division of the Board of Parole as provided in Title 18, U.S.C. §5017(c).³

II.

Following an initial parole hearing conducted on April 6, 1976 at the Federal Correctional Institution in Tallahassee, Florida, the United States Board of Parole on April 20, 1976, issued an order

¹Title 18, U.S.C. §§5005-5026.

²(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

³(c) A youth offender committed under §5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

denying parole and continued petitioner's incarceration with an institutional review hearing scheduled for February, 1977.¹ The reasons for the parole denial were stated as follows:

"Your offense behavior has been rated as moderate severity. You have a salient factor score of 8. You have been in custody a total of 3 months. Guidelines established by the Board for youth cases which consider the above factors indicate a range of 13 to 17 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted."

Such denial was affirmed on May 24, 1976.

Petitioner contends that the use of decision-making guidelines by the U. S. Board of Parole in the determination of when a prisoner sentenced under the Youth Corrections Act shall be released on parole is violative of the purpose of the statute. More specifically, he contends that the Board's consideration of offense severity as a factor in the abovementioned parole decision was contrary to rehabilitative purposes of the Y. C. A. and its provisions for the allowance of release at any time.

III.

However, the guideline tables by themselves are not determinative of any individual case. 28 C.F.R. 2.52.² The format of the

¹There is no indication that the Board is not following the requirement of periodic reports under Title 18, U.S.C. §5016.

²§2.52 Paroling policy guidelines; statement of general policy. (a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration. (b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established for cases with good institutional adjustment and program progress. (c) It is to be stressed that these ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release. (d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision of a severity rating different from that listed.

tables is to list vertically various offenses in terms of severity and to indicate horizontally offender characteristics in terms of "parole prognosis" based on "salient factor scores." Thus, use of the tables does not preclude individualized consideration of each prisoner's case for the reason that consideration of the offender's individual characteristics and institutional performance is clearly mandated thereby. The guidelines are simply statements of customary periods of confinement which are subject to discretionary changes in individual cases and are not arbitrary classifications of periods of time that a youth offender must serve before he is eligible for parole. In this regard, the court in Wiley v. United States Board of Parole, 380 F.Supp. 1194 (M.D. Pa. 1974) specifically stated as follows:

"It should be emphasized that these guidelines were promulgated as just that -- merely guide-lines, and the Board is free to render a decision either above or below the guideline range where in the opinion of the Board the circumstances warrant. For example, the Board may reach a decision below or above the guidelines if the prisoner has an exceptionally good or poor institutional record, or if the Board feels that the clinical parole risk prognosis is substantially better or worse than indicated by the offender characteristics score of the inmate. Thus, while the guidelines structure the discretion of the Board within the broad statutory mandate, the Board remains free to consider each individual case on its merits. The court holds that the Board's published guidelines for parole decision-making are consistent with the general statutory criteria for parole embodied in 18 U.S.C.A. §§4202, 4203, and hence are valid." Id. at 1197.

IV.

Moreover, the Board of Parole uses separate sets of guideline tables for adult and youth sentences. Although the offense severity groupings and salient factor items are the same, the time ranges in the youth guidelines are shorter than those in the adult guidelines.

Petitioner's contention that the youth guidelines violate the Y. C. A. is premised on the theory that consideration of the seriousness of the petitioner's crime, which is represented by the vertical scale of the guidelines, is in conflict with the rehabilitative purpose of the statute. However, in support of this contention, petitioner does not rely upon any express statutory provision prescribing the appropriate Y. C. A. parole criteria. He relies, rather, on general references to the rehabilitative purposes of the Y. C. A. in the legislative history of the Act. See Dorszynski v. United States, 419 U. S. 424 (1974). This Court is cognizant that in Mayet v. Sigler, 403 F.Supp. 1243 (M. D. Penn. 1975) it was held that the Parole Board could not consider the youth guidelines in determining a youth offender's eligibility for parole. However, the court in Mayet, supra, specifically referred to the case of LoCicero v. Day, Civil Action No. 1144 (E.D. Ky. 2/15/74) in which case the court reached an opposite conclusion.

"The Government has cited LoCicero v. Day, et al., Civil No. 1144 (E.D. Kentucky, February 15, 1974) as authority that the Board's use of the guidelines in question is not arbitrary or capricious. The Court is not persuaded to follow the reasoning in LoCicero." Mayet, supra at 1244.

V.

There is no textual support in the Y. C. A. for petitioner's contention that offense severity is an illegal parole consideration.¹ In this regard, the relevant statutory provisions state no parole criteria at all. Therefore, since Congress did not attempt to restate the paroling criteria when it passed the Y. C. A., it seems unlikely

¹ §5017. Release of youth offenders. (a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division. (b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release. (c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

that it intended to radically alter the existing criteria. Accordingly, this Court must conclude that the Board of Parole properly followed the criteria or the general parole statute which authorizes the Board to release the prisoner when it appears that "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws and if in the opinion of the Board such release is not incompatible with the welfare of Society. . . ." Title 18, U.S.C. §4202(a). In Battle v. Norton, 365 F.Supp. 925 (D. Conn. 1973) it was held that the Board's reliance upon the guidelines was fully consistent with the abovementioned statutory criteria and did not constitute an abuse of discretion. See also, Wiley, supra; Lupo v. Norton, 371 F.Supp. 156 (D. Conn. 1974). This Court feels constrained to agree with the reasoning in Battle, supra that if the guidelines were used, severity of the offense was not relied on by the Board to the exclusion of all other factors since the guideline table requires consideration of offender characteristics. Id. at 930.¹ In LoCicero v. Day, supra, the court specifically rejected the petitioner's argument that the application of the guidelines was violative of the rehabilitative purposes of the Y. C. A. and indicated that the abovementioned statutory criteria for parole eligibility should be applied thereunder.

"It is petitioner's claim that the Board violates his rights "in that it has arbitrarily established periods of time for certain categories of offenses which must be served prior to the youth offender being considered for any type of parole." Amended Petition, paragraph No. 7. Petitioner's argument is without merit for the reason that no suggestion of arbitrariness has been shown." Id. at 5.

VI.

Finally, this Court observes that on March 15, 1976, Title 18, U.S.C. §5017(a) was amended to provide for the conditional release of

¹ This Court is cognizant that in Snyder v. United States Board of Parole, 383 F.Supp. 1151 (D. Col. 1974) while it was intimated that the use of guidelines as to Y.C.A. offenders was within the Board's discretion, the court nonetheless required the Board to furnish the defendants with explanations why decisions outside the guidelines were not warranted.

youth offenders in "accordance with the provisions of Section 4206 of this title." Title 18, U.S.C. §4206, as amended on March 15, 1976 states the general parole determination criteria as follows:

"§4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released."

The use of guidelines is thus consistent with the abovementioned statutory parole determination criteria.

VII.

In light of all of the abovementioned considerations, this Court must conclude that the Board of Parole was not precluded from considering offense severity in determining petitioner's eligibility for parole and continuing an institutional review hearing for approximately ten months. Therefore, it follows that petitioner's continued confinement is not violative of the spirit and provisions of the Youth Corrections Act.

For these reasons, it is

ORDERED AND ADJUDGED that this Petition for Writ of Habeas Corpus be, and the same is hereby, DISMISSED.

DONE AND ORDERED at Miami, Florida, this 22 day of September, 1976.

1st C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: U. S. Attorney (AUSA Bates)

Mr. Robert Bryant McKay
Federal Correctional Institution
15801 S. W. 137th Avenue
Miami, Florida 33177

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 692—September Term, 1976.

(Argued January 21, 1977 Decided March 2, 1977.)

No. 76-1496

UNITED STATES OF AMERICA,

Appellant,

—against—

RICHARD A. JACKSON, a/k/a "John Harris,"

Defendant-Appellee.

Before:

LUMBARD and FEINBERG, *Circuit Judges,*
and MISHLER, *District Judge.**

Government appeals from denial by United States District Court for the Southern District of New York, Charles L. Bricant, Jr., *J.*, of its Fed. R. Crim. P. 35 motion to correct sentence imposed on defendant under the Federal Youth Corrections Act, 18 U.S.C. § 5010(d), and in the alternative, petitions for writ of mandamus directing district court to resentence defendant. Petition for writ of mandamus granted.

* Of the Eastern District of New York, sitting by designation.

ALLEN R. BENTLEY, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Ira H. Block, Frederick T. Davis, Assistant United States Attorneys, on the brief), *for Appellant*.

SHILIA GINSBERG (William J. Gallagher, The Legal Aid Society, Federal Defender Services Unit, New York, N. Y., on the brief), *for Appellee*.

FRINBERG, *Circuit Judge*:

In June 1976, Richard A. Jackson pleaded guilty in the United States District Court for the Southern District of New York, before Charles L. Bricant, Jr., *J.*, to one count of bank robbery, 18 U.S.C. §§ 2 and 2113(a). At the sentencing proceeding the following month, Judge Bricant found that Jackson was eligible for, and would benefit from, treatment as a youth offender under the Federal Youth Corrections Act (the Act), 18 U.S.C. § 5005 et seq.: Jackson was 21 years old; he was conscientiously combatting his problem of drug addiction at a drug rehabilitation facility; and he had cooperated with the government in providing details on his and his co-defendant's participation in the bank robbery. The judge then sentenced Jackson to one year's incarceration as a youth offender under § 5010(d) of the Act. The government moved for resentencing, pursuant to Fed.R.Crim.P. 35, arguing that a sentence of a fixed term under § 5010(d) is not a youth offender sentence under the Act. The district court denied the government's motion, and the government now appeals or, in the alternative, seeks a writ of mandamus directing resentencing.

1

Jackson's preliminary claim that we should dismiss for lack of appellate jurisdiction requires only brief discussion. He argues that direct governmental appeal does not lie because 18 U.S.C. § 3731 does not explicitly permit appeal from the denial of a Rule 35 motion. See *United States v. Jenkins*, 420 U.S. 358, 363 (1975). We need not, however, reach that issue. The government has challenged the district judge's power to impose the sentence that he did, and such an issue of judicial power has long been recognized as falling squarely within the narrow range of cases for which mandamus is appropriate. See *Ex parte United States*, 242 U.S. 27, 39-40 (1916); *United States v. United States District Court, Central District of California*, 509 F.2d 1352 (9th Cir.), cert. denied sub nom. *Rosselli v. United States*, 421 U.S. 902 (1975). We therefore conclude that we should exercise our discretionary jurisdiction over the government's petition for a writ of mandamus.

II

On the merits, we are faced for the second time in less than a year with the issue whether a district judge may set a fixed maximum of less than six years for a youth offender's sentence. In *United States v. Cruz*, 544 F.2d 1102 (2d Cir. 1976), this court vacated a district court's sentence under 18 U.S.C. § 5010(b)¹ that provided for a maximum term of two years. The court reasoned that

¹ Section 5010(b) reads:

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(a) of this chapter. . . .

§ 5010(b) and its companion provision, § 5017(c)² only allow the judge to impose an indeterminate period of confinement with a maximum term of six years; they do not allow a maximum term of less than six years. Here, the district judge attempted to impose a maximum of one year under the Act, but used a different provision, § 5010(d), on the theory that this section bestows broad sentencing discretion under the Act, including the option of imposing a maximum of less than six years.³ We disagree.

In considering the question of maximum sentences under the Act, the *Cruc* court examined not only §§ 5010(b) and 5017(c), but also the Act's entire structure. It concluded that

a district judge is given only three options under the Act: (1) probation, under § 5010(a), (2) an indeterminate period of confinement with a maximum of six years, under §§ 5010(b) and 5017(c), and (3) an indeterminate period of confinement with a maximum equal to the period authorized by law for the offense, under §§ 5010(c) and 5017(d)

The emphasis in structuring the Act was on treatment of youthful offenders under the watchful eye of an informed professional body which would tailor the length of sentence actually to be served to fit the needs

2 Section 5017(c) reads:

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

3 Section 5010(d) reads:

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

of the individual. Any provision for fixing a maximum term by the court is conspicuously absent save in the single instance contemplated by §§ 5016(c) and 5017(d), in which the court is to provide for the contingency that a serious offender may not be able to derive maximum benefit from the treatment in less than six years.

Cruz, supra, 544 F.2d at 1164 (footnotes omitted). In short, the Act leaves the length of the sentence (within the statutory maximum terms) of youth offenders to the discretion of the Parole Commission, not the district court. Section 5010(d) does not affect this conclusion. That section provides for the sentencing of a defendant as an adult subject to the general penalty provisions outside of the Act, see *Dorszynski v. United States*, 418 U.S. 424, 441-42 (1974). And as *Cruz* implicitly holds, it does not give the judge discretion to enlarge upon the three sentencing options provided by §§ 5010(a), (b), and (c).⁴

Jackson urges that a broad reading of § 5010(d) is necessary to correct the current policy of the Parole Commission. Indeed, at the heart of both this case and *Cruz* is the impact that the Commission's Parole Release Guidelines, 29 C.F.R. § 2.20 (1976), have on youth offender sentences. These Guidelines establish initial parole eligibility by giving substantial weight to the severity of the crime committed. In this case, for instance, if Jackson were given an indeterminate sentence under § 5010(b), the probation officer estimated that, because of the crime he committed, he would not be eligible for parole under the Guide-

⁴ The *Cruz* court was clearly aware of the contention that § 5010(d) authorized the imposition of a maximum term of less than six years. Judge Belmont had already written an opinion expressing that view, *Kenneth Harrison v. United States*, 438 F. Supp. 356 (S.D.N.Y. 1976), and the government's brief in *Cruz* directly addressed the issue.

lines until he served 36 to 45 months in prison. Yet, as Judge Bricant noted, if Jackson had been over 26, he would have given him a maximum adult sentence significantly shorter than 36 to 45 months. Thus the Parole Guidelines may have the anomalous effect of prolonging Jackson's prison term because the court determined that he would benefit from treatment as a youth offender.

We join with the *Cruz* court's criticism of the Parole Guidelines as they are applied, apparently mechanically, to youth offenders. *Cruz*, supra, 544 F.2d at 1164-65 n.6. Such application of the Guidelines is not only inconsistent with the purposes of the Act, but may also undermine the justification for the Act's indeterminate sentencing provisions. See *United States v. Toran*, 537 F.2d 661, 664 (2d Cir. 1976). But we also agree that the remedy for the inequities created by the interaction between the Guidelines and the Act rests either in administrative reform or Congressional action. See *Cruz*, supra, at 507; cf. *Allegaert v. Perot*, slip op. 1521, 1533 n.14 (2d Cir. Jan. 25, 1977). We accordingly grant the writ of mandamus and direct that the district court vacate Jackson's sentence and re-sentence him.⁵

Petition for writ of mandamus granted.

5 On resentencing, the district judge will still have various options open; e.g., sentencing Jackson as an adult under § 5010(d), or sentencing him as a youth offender and imposing probation under § 5010(a) if the judge determines that such a sentence is now justified in view of Jackson's incarceration since July 29, 1976.

No. 76-1505

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD CHARLES RUIP,

Appellant,

v.

UNITED STATES OF AMERICA,

*Appellee.*APPEAL from the
United States District
Court for the North-
ern District of Ohio.

Decided and Filed April 8, 1977.

Before: PHILLIPS, Chief Judge, and WEICK and LIVELY, Cir-
cuit Judges.

PHILLIPS, Chief Judge. This appeal presents four issues:

- 1.) Whether the promulgation of parole guidelines by the United States Parole Commission violated the prohibition against ex post facto laws when applied retroactively;
- 2.) Whether the application of the parole guidelines to a prisoner sentenced before their issuance violated Rule 11 of the Federal Rules of Criminal Procedure;
- 3.) Whether due process of law required that a prisoner be allowed an opportunity to provide supplemental information to the Parole Commission regarding his "salient factor score"; and
- 4.) Whether a prisoner's sentence should have been vacated because the sentencing judge's expectations of parole eligibility were changed by the parole guidelines.

We conclude that the third issue is not properly before this Court. We answer the other three questions in the negative, and affirm the decision of the district court.

I.

Appellant, Richard Charles Ruip, pled guilty to violation of 18 U.S.C. § 2113(a) and (d) for his participation in an armed bank robbery. On July 27, 1971, he was sentenced to eighteen years imprisonment pursuant to 18 U.S.C. § 4203 (a)(2) and delivered to the custody of the Attorney General.

At the time appellant was sentenced, all parole release decisions were made by members of the United States Board of Parole (Parole Commission),¹ with decisions based not on formally articulated criteria or policies, but on the discretionary judgment of the members of the Parole Commission. The primary focus in decision making was directed toward intuitive perceptions of institutional behavior and the probability of recidivism. Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L. J. 810, 820 (1975) [Hereinafter cited as Project].

In 1973 the Parole Commission established a national parole policy and adopted parole guidelines² to promote what it felt was a more consistent and equitable exercise of its discretion. See 28 C.F.R. § 2.20 (1976). The guidelines indicate the customary range of time to be served before release for various combinations of offense severity and parole prognosis characteristics. Under the guidelines an inmate's record is examined to determine his "salient factor score." This figure was statistically designed to predict the potential risk of parole violation and consists of nine weighted personal characteristics such as

¹ The statute creating the United States Board of Parole has been repealed and the United States Parole Commission has been established to replace it. Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (March 15, 1976), codified in 18 U.S.C. §§ 4201-18, 5005 et seq. The term Parole Commission will be used throughout this opinion for the sake of clarity.

² 38 Fed. Reg. 31,942 (1973).

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prior convictions, employment history etc. Project, *supra* at 824. Next, the inmates offensive behavior is classified on the "offense severity scale" in one of six categories from low to greatest. This rating reflects the Parole Commission's independent, subjective evaluation of the gravity of the inmate's criminal behavior. Project, *supra* at 823-24. Together, the salient factor score and the offense severity rating are used in conjunction with a table³ to determine a suggested time range during which the inmate should remain incarcerated.⁴

The suggested time range is merely a guideline. Where circumstances warrant, decisions either above or below the guidelines may be rendered. 28 C.F.R. § 2.20(c) (1976). Nevertheless, experience indicates that the overwhelming majority of parole decisions fall within the guidelines. *United States v. Salerno*, 538 F.2d 1005, 1007 (3rd Cir. 1976); Project, *supra* at 825 n. 75.

During his incarceration, appellant established a good institutional record. He earned a high school equivalency (G.E.D.) diploma, accrued a number of credits on the college level and completed vocational courses in welding. Weighing against appellant, however, was the fact that the crime to which he had pled guilty in the present case occurred while he was on parole, and less than one year after he had served nine and one-half years for his part in a previous armed robbery.

Appellant had a hearing before the parole hearing examiner panel on October 20, 1975. The panel recommended that he be released on parole on January 20, 1976. This decision by the local panel was referred to the National Directors for reconsideration of the panel's decision, and on November 20, 1975, appellant was informed that his parole had been denied

³ 28 C.F.R. § 2.20 (1976).

⁴ To formulate the suggested time ranges in the guidelines a research staff analyzed a retrospective sample of parole decisions to develop average ranges of time actually served before parole by offenders with various combinations of severity and salient factor ratings. Project, *supra* at 825.

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by the National Appellate Board and his imprisonment would continue until March 1977, at which time he would receive another review. The National Appellate Board gave the following reasons for denying petitioner's parole:

Your offense behavior has been rated as greatest severity because shots were fired during commission of armed bank robbery. You have a salient factor score of 3. You have been in custody a total of 55 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of more than 65 months to be served before release for cases with good institutional program performance and adjustment. Board guidelines for greatest severity cases do not specify a maximum limit. Therefore, the decision in your case has been based in part upon a comparison of the relative severity of your offense behavior with offense behavior examples listed in the very high severity category.

Appellant challenged the denial of his parole in the district court by alternative motions for a writ of habeas corpus⁵ or for vacation of sentence.⁶ The motions were denied and appellant seeks relief in this court.

II.

The Constitution of the United States specifies that "No Bill of Attainder or ex post facto Law shall be passed." art. I, § 9, cl. 3. A law falls within the prohibition on ex post facto laws if it, "makes an action done before the passing of the law, and which was innocent when done, criminal; [or] . . . changes

⁵ 28 U.S.C. § 2241 (1976).

⁶ 28 U.S.C. § 2255 (1976). No issue is raised on the present appeal as to whether the District Court had jurisdiction under § 2255. There is a conflict among the Circuits on this issue. Compare *United States v. DiRusso*, 525 F.2d 673 (1st Cir. 1976) and *Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975). This court reserves a decision on this question. Our opinion in this case is not intended to be a precedent for the proposition that decisions of the United States Parole Commission can be reviewed by a motion to vacate under § 2255.

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the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

Appellant contends that the Parole Commission guidelines operated as an ex post facto law in delaying his release on parole. In the absence of these guidelines, appellant asserts, he would have been released on parole on January 20, 1976, due to his superior institutional adjustment. The effect of these administrative guidelines, he insists, was to change the rules and lengthen his incarceration, thereby imposing a greater punishment for his crime. This administrative action, appellant asserts, was invalid as an ex post facto law.

Appellant's contention raises two questions: 1) whether the eligibility of convicted persons for parole is a part of "the law annexed to the crime when committed" under *Calder v. Bull*, *supra*, 3 U.S. (3 Dall.) at 390; and 2) whether administrative guidelines on parole come within the prohibition on ex post facto laws.

In determining whether parole eligibility is a part of the law annexed to the crime, when committed, we first look to the statute prescribing the offense to which appellant pled guilty:

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

• • •

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

• • •

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of

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this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113 (1970 & Supp. 1976)

Entirely different statutes apply in determining parole eligibility. District Judge Thomas D. Lambros noted in his opinion in this case:

At the time of sentencing, a district judge has three sentencing alternatives in terms of parole release. Under 18 U.S.C. § 4202, the judge may require a defendant to serve one-third of the sentence imposed before becoming eligible for parole release. Under 18 U.S.C. § 4205(a)(1), the judge may set a minimum period of incarceration to be served before the defendant is eligible for parole, not to exceed one-third of the sentence imposed. Last, under 18 U.S.C. § 4208(a)(2), a sentencing judge may leave the matter of parole solely up to the board of parole, with no minimum time required.⁷

Although the parole provisions are set forth in a statute separate and apart from the bank robbery statutes, the courts have come to regard parole eligibility as an integral part of a sentence. Additionally, "only an unusual prisoner could be expected to think he was not suffering a penalty when he was denied eligibility for parole." *Warden v. Marrero*, 417 U.S. 653, 662 (1974). In any practical analysis, parole consideration is a part of the law annexed to the crime. The Ninth Circuit decision in *Love v. Fitzharris*, 460 F.2d 332, 384 (9th Cir. 1972), *vacated as moot*, 409 U.S. 1100 (1973), holding that under California law parole eligibility is a part of the sentence and thus a part of the law annexed to the crime, is an accordance with this view.

⁷ The statutes regarding sentencing and parole alternatives have been changed since Judge Lambros wrote this opinion. Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 233 (March 15, 1976).

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The next question is whether, under the circumstances of this case, administrative guidelines on parole come within the prohibition against ex post facto laws. The Parole Commission and its predecessor, the Board of Paroles, are independent bodies established by Congress, whose members are appointed by the President. The Board of Paroles during its existence had absolute discretion in matters of parole and the courts were without the power to grant a parole or to determine eligibility for parole.

The very broad discretion vested in the Board of Paroles by Congress carried with it authority to establish such guidelines as would best effectuate the purpose of Congress in establishing the Board and the parole system. See Act of Aug. 25, 1958, Pub. L. No. 85-752, § 3, 72 Stat. 845; *Earnest v. Moseley*, 426 F.2d 466, 469 (10th Cir. 1970). Congress expressly conferred this power to promulgate guidelines upon the newly created Parole Commission. Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 4203, 90 Stat. 233 (March 15, 1976), codified in 18 U.S.C. § 4203.

The Ninth Circuit held in *Love v. Fitzharris*, *supra*, 460 F.2d 382, that a change in an agency interpretation of statutes, which absent a court pronouncement on the matter, had the force and effect of law, could violate the prohibition on ex post facto law.²

² At the time Love began serving his sentence the California Department of Corrections took the position that where consecutive sentences had been imposed, California Penal Code § 3049 applied and a prisoner could be paroled after the expiration of one-third of his minimum sentence. Under this interpretation, Love, who was serving consecutive sentences for two violations of the narcotics laws, each violation carrying a minimum term of five years imprisonment, would have been eligible for parole in three years and four months. However, the Department subsequently reinterpreted the parole eligibility statutes with respect to consecutively sentenced narcotics offenders and concluded that persons serving consecutive sentences would be eligible only after serving two and one-half years imprisonment on each consecutive violation. The Department then notified Love that he would be eligible for parole in five years not the three years four months determined earlier. The District Court concluded, *Love v. Fitzharris*, 311 F.Supp. 702 (N.D. Cal. 1972), and the Ninth Circuit affirmed, that this action violated the prohibition on ex post facto laws.

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Love is inapposite because what is involved in this case is not agency interpretation of law but an agency's setting up guidelines for itself to assure the uniform execution of its business. These guidelines are not law, but guideposts which assist the Parole Commission (and which assisted the Board of Paroles) in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not fixed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines. We, therefore, conclude that *Love* does not support the contention of appellant.

In *Warden v. Marrero*, *supra*, 417 U.S. at 663, the Supreme Court warned that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present [a] serious question under the ex post facto clause of . . . the Constitution. . . ." The Court in *Marrero* was presented with the statutory effect of Congressional enactments affecting parole eligibility. Since the relevant provisions were statutes, there was no question that they were encompassed in the prohibition on ex post facto laws. The situation here is different. As emphasized above, the provisions here are merely administrative guidelines, adopted by the Parole Commission (and the Board of Paroles) to assist it in attaining a more uniform exercise of its discretion.

III.

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part:

The court may refuse to accept a plea of guilty, and shall not accept such a plea . . . without first . . . determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(Emphasis added)

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Appellant contends that ineligibility for parole is a consequence of a guilty plea within the meaning of Rule 11 and therefore must be made known to a defendant before the court can accept his plea. Appellant insists that he was led to believe that satisfactory institutional achievement would expedite his release on parole. The subsequent promulgation of the parole guidelines by the Parole Commission changed this policy to his detriment and, he asserts, since he did not have a complete understanding of the consequences of his plea, the voluntariness of his guilty plea has been vitiated.

In *Harris v. United States*, 426 F.2d 99 (6th Cir. 1970), this Court dealt with the necessity for informing a defendant under Rule 11 of his statutory ineligibility for parole⁹ if he pleaded guilty to a narcotics offense. We concluded that "a defendant indicted for a narcotic offense does not voluntarily plead guilty with knowledge of the consequences of his plea if he is unaware of his ineligibility for parole." *Id.* at 101. The overwhelming majority of circuits are in accord with this view.¹⁰

The basis for these holdings is rooted in a defendant's expectations of parole. As the Eighth Circuit noted in *Moody v. United States*, *supra*, 469 F.2d at 708:

⁹ Act of Nov. 8, 1966, Pub. L. No. 89-723, Title V, § 501, 80 Stat. 1449, repealed by Act of Oct. 27, 1970, Pub. L. No. 91-513, Title III, § 1101(b)(4)(A), 84 Stat. 1292.

¹⁰ First Circuit: *Durant v. United States*, 410 F.2d 89 (1st Cir. 1969);

Second Circuit: *Bye v. United States*, 435 F.2d 177 (2d Cir. 1970);

Third Circuit: *Berry v. United States*, 412 F.2d 189 (3rd Cir. 1969);

Fourth Circuit: *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364 (4th Cir.), *cert denied*, 414 U.S. 1005 (1973);

Sixth Circuit: *United States v. Rex*, 465 F.2d 875 (6th Cir. 1972);

Seventh Circuit: *United States v. Smith*, 440 F.2d 521 (7th Cir. 1971);

Eighth Circuit: *Moody v. United States*, 469 F.2d 705 (8th Cir. 1972);

Ninth Circuit: *Munich v. United States*, 337 F.2d 356 (9th Cir. 1964);

Tenth Circuit: *Jenkins v. United States*, 420 F.2d 433 (10th Cir. 1970).

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The rationale underlying the view of the majority of the circuits is that a defendant, unaware at the time of entering a plea of guilty that he will be ineligible for probation or parole, does not plead with understanding of the consequences of the plea, since the nature of parole is so well understood that its availability may be regarded as assumed by the average defendant. *Durant v. United States*, 410 F.2d 689, 692 (1st Cir. 1969).

We have extended this rule to require a district court to advise a defendant of a mandatory special parole term before it can accept his guilty plea under Rule 11. *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975).¹¹

It is the better policy for a district court to inform a defendant of any circumstance that affects the length of his or her incarceration. See *Harris v. United States*, *supra*, 426 F.2d at 101. Since the typical defendant assumes the availability of parole, it is imperative that he or she be informed of the terms and conditions of eligibility for parole and any limitations upon it. A defendant should be warned that parole decisions are made independently by the Parole Commission and that decisions outside the parole guidelines are possible. This advice is important when the parole guidelines effectively preclude

¹¹ This is in accordance with a number of circuits who have decided this issue:

First Circuit: *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975);

Second Circuit: *Michel v. United States*, 507 F.2d 461 (2d Cir. 1974);

Third Circuit: *Roberts v. United States*, 491 F.2d 1236 (3rd Cir. 1974);

Sixth Circuit: *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975);

Eighth Circuit: *United States v. Richardson*, 483 F.2d 516 (8th Cir. 1973).

Contra

Fourth Circuit: *Bell v. United States*, 521 F.2d 713 (4th Cir. 1975); cert. denied, 424 U.S. 913 (1976).

Seventh Circuit: *United States v. Brown*, 499 F.2d 829 (7th Cir.), cert. denied, 419 U.S. 1047 (1974).

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the likelihood of parole before the completion of the sentence.¹²

Nevertheless, in the present case the parole decision regarding the appellant remains within the discretion of the Parole Commission, a fact of which appellant presumably was aware of at the time of his guilty plea. The promulgation of the parole guidelines did not severely limit or preclude the exercise of discretion by the Parole Commission as the statutes did in *Harris, supra*, 426 F.2d 99, and *Wolak, supra*, 510 F.2d 164. As we stated above, the guidelines merely promoted a more consistent and equitable exercise of discretion in parole-making decisions. Upon the facts of this case we conclude that the application of the parole guidelines to appellant did not violate Rule 11 of the Federal Rules of Criminal Procedure.

IV.

Appellant contends that the fifth amendment's due process protection extends to parole release hearings and that he should have been given a meaningful review and an opportunity to provide supplemental information to the Parole Commission before a decision to deny him parole was reached. In particular, appellant challenges the determination of his salient factor score alleging that he was not awarded a point for the high school equivalency diploma (G.E.D.) he earned while incarcerated, and that he was not awarded a point because his crime did not involve auto theft. See 28 C.F.R. § 2.20 (1976).

Appellant asserts that minimum due process is required under *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Wolff v.*

¹² In *United States v. Salerno, supra*, 538 F.2d at 1006 (3rd Cir. 1976), the guidelines suggested 45-55 months of incarceration before release on parole, the 45 months being 9 months longer than his three year maximum sentence. This anomaly occurs because the Parole Commission makes its offense severity rating on the basis of the "offensive behavior" of the defendant, rather than the crimes which he or she pled guilty to or were convicted of. *Project, supra* at 881. Knowledge of this situation may affect a defendant's plea to a lesser offense, since the Parole Commission will apply its guidelines to the original crime and not the reduced offense.

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McDonnell, 418 U.S. 539 (1974), because the denial of parole represents an immediate threat to his liberty. If parole is granted, he continues, he is conditionally free, while if denied, his incarceration continues. Whether to extend due process to situations where, unlike parole revocation hearings, the defendant is not yet at liberty has created a conflict among the circuits.¹³ The Supreme Court granted certiorari to address this conflict, but the case became moot before the issue was resolved. *Weinstein v. Bradford*, 423 U.S. 147 (1975) (Vacating as moot the Fourth Circuit decision holding that due process applies to parole denial proceedings).

We find it unnecessary to decide this issue in the present case. While appellant requests a due process hearing on the determination of his salient factor score, his offense was rated "greatest severity" and under the guidelines his salient factor score was not determinative of the time he would be incarcerated. Further, appellant did not challenge the validity of his salient factor score in the District Court. Since this issue was not raised in the District Court, we do not consider the question of whether due process required the Parole Commission to allow appellant to contest his salient factor score to be properly before us. *Banner v. American Can Co., Inc.*, 525 F.2d 104 (6th Cir. 1975), *cert. denied*, 426 U.S. 942 (1976); *Dupes v. Johnson*, 353 F.2d 103 (6th Cir. 1965).

V.

Appellant was sentenced to eighteen years imprisonment in July 1971, more than two years before the parole guidelines appeared in the Federal Register. 38 Fed. Reg. 31,942 (1973). The District Judge sentenced appellant under a statute in effect

¹³ See e.g., *Brown v. Lundgren*, 528 F.2d 1050 (5th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3329 (Nov. 3, 1976) (Due process does not apply to parole eligibility process); *Childs v. United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974) (Due Process does apply to parole eligibility process).

at that time, 18 U.S.C. § 4208(a)(2) (1969),¹⁴ which provided that a prisoner could be eligible for parole at such time as the Parole Commission determined. Appellant now contends that the sentencing judge could not have been aware that issuance of the parole guidelines would effectively extend the period of his incarceration beyond what the judge had contemplated at the time of sentencing. As a result, appellant concludes, his case should be remanded to Judge Lambros, the sentencing judge, so that the judge may exercise his discretion on whether to modify the sentence in view of these new parole guidelines.

Three circuits have considered this problem and ordered re-sentencing out of concern for the effect of the guidelines on the sentencing process. *Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975); *United States v. Slutsky*, 514 F.2d 1008 (2d Cir. 1975); *United States v. Salerno*, 538 F.2d 1005 (3rd Cir. 1976). As the Second Circuit observed:

The judge who sentences a prisoner under § 4208(a)(2) ordinarily contemplates that, at an appropriate time before the one-third point in the sentence, the Parole Board will exercise a meaningful judgment upon, i.e., give "serious consideration" to, the question of whether the prisoner should be paroled before the one-third point.

505 F.2d at 1217-18 (footnote omitted).

¹⁴ 18 U.S.C. § 4208(a) stated:

§ 4208. Fixing eligibility for parole at time of sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

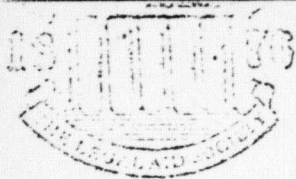
Repealed by Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 233 (March 15, 1976).

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Since in all probability the appellants will not receive the parole treatment envisioned by the sentencing judge, there should be an opportunity for reconsideration in light of all recent developments in the area. *United States v. Slutsky, supra* at 1229.

It may be that under ordinary circumstances, since appellant was sentenced pursuant to 4208(a)(2), his sentence would be vacated and his case remanded to the sentencing judge for reconsideration of the sentence in light of the parole guidelines. However, appellant was scheduled to be considered for parole by the Parole Commission in March 1977 at which time appellant would have already served the time suggested by the parole guidelines. In view of the fact that the parole guidelines will thus have a de minimus effect on appellant in the future and that a remand might hamper his parole consideration, appellant's sentence will not be vacated in the present case.

The decision of the District Court is affirmed.



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President

77-0350 (77-0383) (77-0833)

1977 FEB 29 PM 5:54
Executive Director
Attorney-in-Chief

S. D. N. Y.

A 71

February 4, 1977

RECEIVED

FEB 7 1977

U.S. PAROLE COMMISSION
LEGAL

David E. O'Connor
Post Release Analyst
United States Parole Commission
Scott Building - Scott Plaza II
Industrial Highway
Tinicum Township
Philadelphia, Pa. 19113

re: Shepard, Lyman T.
Reg. No. 37289-115

Dear Mr. O'Connor:

As I requested in our telephone conversation of today, please send me a copy of the hearing examiners' summary of the January 11, 1977 revocation hearing and their tentative decision regarding Mr. Shepard.

Further, please send me copies of any and all other papers, memoranda, documents, etc., that have been placed in Mr. Shepard's parole file since my previous request for disclosure of the file made in early December, 1976.

Sincerely,

Gordon J. Johnson
Staff Attorney

GJJ/fm

cc: Lyman Shepard
Metropolitan Correctional Center
150 Park Row
New York, New York 10033

Phyllis Bauberger
Legal Aid Society
U.S. Courthouse Rm. 502
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The purpose of the Society is to render legal aid in the City of New York to persons who are unable to employ other counsel.—Bylaws of The Legal Aid Society.

United States Department of Justice
United States Parole Commission
Washington, D.C. 20537

A 72

February 24, 1977

Mr. Gordon Johnson
Staff Attorney
The Legal Aid Society
Criminal Appeals Bureau
15 Park Row 19th Floor
New York, New York 10038

Re: Information Request
Shepard, Lyman T
Reg. No. 37289-115

Dear Mr. Johnson:

This is in response to your request for information in Mr. Shepard's file which was received in the Northeast Region on February 7, 1977. Your letter seeks all documents included in the file since your last request.

You will find the following documents enclosed.

Phone Slip	Feb. 4, 1977
Letter from Mr. Johnson	Jan. 17, 1977
Letter from Mr. Smith	Jan. 7, 1977
Phone Slip	Jan. 25, 1977
Notices of Action	Jan. 27, 1977
Orders (2)	Jan. 24, 1977
Letter to Mr. Johnson (and rough draft)	Jan. 10, 1977
Phone Slip	Jan. 10, 1977
Letter from Mr. Johnson	Jan. 5, 1977
Hearing Summary	Jan. 11, 1977
2 Guidelines Worksheets Form H-1(a)	undated
2 Affidavits	Jan. 14 & 18, 1977
Memorandum from Mr. Crawford	Dec. 10, 1976
3 Phone Slips	Dec. 13, 1976
Memorandum from Mr. O'Connor	Dec. 13, 1976
Letter to Mr. Shepard	Dec. 14, 1976
2 Designations	Dec. 14, 1976
2 Phone Slips	Dec. 14, 1976
2 Phone Slips	Dec. 15, 1976
Letter to Mr. Johnson	Dec. 15, 1976
Slip	undated
Phone Slip	Jan. 6, 1977

cc: Johnson



- 2 -

Phone Slip	January 5, 1977
Slip	undated
Letter to Mr. Johnson	Dec. 22, 1976 ✓
Teletype	Dec. 23, 1976
Cover Memo from Mr. O'Connor	Dec. 23, 1976
Phone Slip	Dec. 22, 1976
Letter from Probation Officer Kahn with attachments	Dec. 15, 1976
Cover Memo from Mr. O'Connor	Dec. 17, 1976
Letter from Probation Officer Falhenburg with attachments	Dec. 14, 1976
Referral to Regional Commissioner	undated
Memo from Mr. O'Connor (portion deleted)	Jan. 10, 1977
Phone Slip (portion deleted)	Jan. 5, 1977
Phone Slip (portion deleted)	Jan. 7, 1977
Phone Slip (portion deleted)	Dec. 15, 1976

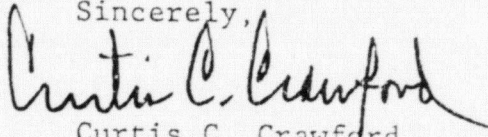
Portions of a January 10th memorandum and phone slips dated December 15th, as well as January 5th and 7th were deleted inasmuch as these intraagency memos contain recommendations and opinions of the Legal Counsel regarding litigation brought by you in Mr. Shepard's case. For this same reason phone slips dated January 6th, 10th and 13th are also being withheld.

A New York Department of Probation Report prepared on October 21, 1974 is also included in Mr. Shepard's file. Inasmuch as this is an investigative report prepared with a promise of confidentiality for the Court, the Commission will not provide you with a copy of that document. I suggest that you contact New York State authorities if you wish to examine this document.

The United States Parole Commission has been deemed exempt from certain provisions of the Privacy Act of 1974 by the Attorney General. All material granted, excised from documents, or denied herein has been processed under the authority of the Alternate Means of Access which is part of said exemption. The exemption including the Alternate Means of Access is published in the Federal Register of August 27, 1975 (Vol. 40 No. 167, p. 39412) [28 C.F.R. §16.85].

You have thirty working days from receipt of this letter to appeal to the Deputy Attorney General from any denial contained herein.

Sincerely,



Curtis C. Crawford
Acting Chairman
U.S. Parole Commission

FM:cl

Enclosures

cc: Mr. Joseph Nardoza
Regional Commissioner

Sara Thomas
Freedom of Information and
Privacy Act Unit
Office of Management and Finance